IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

vs.

CARMELO BLUNDO

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEPTEMBER TERM, 1975

Nos. 1004, 1014, 1044, 1111

Argued May 20, 1976 Decided July 1, 1976

Docket No. 76-4042

PITTSTON STEVEDORING CORPORATION and
THE HOME INSURANCE COMPANY,
Petitioners,

v.

ANTHONY DELLAVENTURA,
Respondent,

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION
PROGRAMS, U.S.D.L.,
Party in Interest.

Docket No. 76-4009

NORTHEAST MARINE TERMINAL COMPANY, INC., Employer

and

STATE INSURANCE FUND, Carrier,
Petitioners,

v.

RALPH CAPUTO, Claimant

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Docket No. 76-4043

PITTSTON STEVEDORING CORPORATION,
Petitioner,

v.

JOHN SCAFFIDI,
Respondent.

Docket No. 75-4249

CARMELO BLUNDO,
Claimant-Respondent,

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,
Self-Insured Employer—Petitioner,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Before LUMBARD, FRIENDLY and OAKES, Circuit Judges.

Petition to review four orders of the Benefits Review Board granting awards under the Longshoremen's and Harbor Workers' Compensation Act. One petition is dismissed as untimely and a second as having been mooted by payment of the award by the insurance carrier; the other two awards are affirmed.

Joseph F. Manes, Esq., Croton-on-Hudson, N.Y., for Pittston Stevedoring Corporation and The Home Insurance Company.

William M. Kimball, Esq., New York, N.Y. (Burlingham Underwood & Lord, Esqs., of Counsel), for Northeast Marine Terminal Company and State Insurance Fund.

Leonard J. Linden, Esq., New York, N.Y. (Linden & Gallagher, Esqs., of Counsel), for International Terminal Operating Company, Inc.

Angelo C. Gucciardo, Esq., New York, N.Y. (Israel, Adler, Ronca & Gucciardo, Esqs., of Counsel), for Respondents Dellaventura, Caputo, Scaffidi and Blundo.

Ronald E. Meisburg, Esq., U.S. Department of Labor, Washington, D.C. (William J. Kilberg, Solicitor of Labor; Laurie M. Streeter, Associate Solicitor; Jean S. Cooper, Esq., and Francine K. Weiss, Esq., Department of Labor, of Counsel), for Director, Office of Workers' Compensation Programs.

Thomas W. Gleason, Jr., New York, N.Y. (Irwin Herschlag, Esq., New York, N.Y., of Counsel), for International Longshoremen's Association, AFL-CIO, *amicus curiae.*

Thomas D. Wilcox, Esq., Washington, D.C., for National Association of Stevedores, *amicus curiae.*

FRIENDLY, Circuit Judge:

We have here four petitions under 33 U.S.C. § 921(c), by employers, in some instances joined by their insurance carriers, to review orders of the Benefits Review Board (BRB) affirming compensation awards made to four employees under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972, 33 U.S.C. §§ 901 et seq.[1] They present a question of con-

[1] The Benefits Review Board was created by the 1972 Amendments to the LHWCA as an independent, "quasi-judicial" body within the

siderable importance, namely, how far the 1972 Amendments extended the coverage of LHWCA.

Presented with the same general issue, a divided panel of the Fourth Circuit ruled in favor of the employers, *I.T.O. Corporation of Baltimore* v. *Benefits Review Board, U.S. Dep't of Labor and Adkins*, 529 F.2d 1080 (1975), holding that the Act extended benefits only to persons injured while unloading cargo from the ship to what the majority termed a "first point of rest," i.e., the first place where the cargo is deposited on a pier or terminal area after being unloaded, and to persons injured while loading cargo from the "last point of rest," 529 F.2d at 1081. The *I.T.O.* case has been reheard *en banc*. We are told that only one other circuit has construed the extended coverage provisions here at issue, *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9 Cir. 1975), rehearing denied, Feb. 6, 1976, petition for cert. filed, No. 75-1620, 44 U.S.L.W. 3645 (U.S. May 6, 1976), a case we do not consider to be truly relevant, but that the issue here presented is *sub judice* in the First Circuit, *John T. Clark & Son of Boston, Inc.* v. *William Stockman*, No. 75-1360, argued Jan. 5, 1976, and in the Fifth Circuit. Given the importance of the question, the number of courts of appeals endeavoring to find an

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Department of Labor. 33 U.S.C. § 921(b)(1); 20 C.F.R. § 801.103 (1975). Its three members are appointed by the Secretary of Labor, and it is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter," made by the administrative law judges who hear LHWCA claims in the first instance. 33 U.S.C. §§ 919(d), 921(b)(1) and (3) (as amended). Prior to the 1972 amendments, there was no administrative review procedure for LHWCA claims; cases were heard in the first instance by Deputy Commissioners and review was then had in the United States district courts. 33 U.S.C. § 921 (1970). Under the 1972 amendments cases are heard by an administrative law judge whose decisions are reviewed by the BRB, and appeals lie to the court of appeals directly from final orders of the BRB. 33 U.S.C. § 921(c).

answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said. In consequence we shall not dwell on the long history of the problem of affording appropriate remedies for longshoremen and harbor workers against their employers which had its inception in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917)—a history which is interestingly traced in Gilmore & Black, The Law of Admiralty §§ 6-45 to -49 (2d ed. 1975)—but will proceed directly to the cases in hand.

I. The 1972 Amendments

The situation that led to adoption of the 1972 Amendments was described as follows in the portion of the Senate Report headed "Need for the Bill," S. Rep. No. 92-1125, 92d Cong., 2d Sess. 4-5 (1972):

> Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of his injury. The Supreme Court has ruled that such ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.
>
> The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.

> For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.
>
> The bill reported by the committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose only support will be payments under the Act.

In practical terms the bill was a trade-off. See *Landon* v. *Lief Hoegh and Co., Inc.*, 521 F.2d 756, 761-62 (2 Cir. 1975), cert. denied, 96 S.Ct. 783 (1976). Stevedores and other employers were pushing for complete abolition of the three-way damage action possible under *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85 (1946), which held longshoremen and other harbor workers to be "seamen" entitled to sue the ship for unseaworthiness, and *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), which permitted the shipowner to seek indemnity for any liability thus entailed from an injured worker's employer. This triangle in effect exposed the employer (already liable for and often having paid the limited benefits provided by the LHWCA) to an unlimited liability to the employee for damages and to the shipowner for its counsel fees in defending the employee's

suit. The unions representing longshoremen and other harbor workers, which for years had been seeking increased benefits under the Act, opposed Congressional repeal of their *Sieracki*-created status as "seamen" in part on the grounds that the LHWCA's benefits were so low that workers needed the additional protection of the "unseaworthiness" doctrine. The compromise between these positions effected by the 1972 Amendments was this: The *Sieracki* action for unseaworthiness was eliminated, longshoremen in the future could sue the ship only for negligence, and employers were immunized from indemnity suits by shipowners. 33 U.S.C. § 905(b). In return, the workers were to secure increased benefits under LHWCA and, what is here pertinent, an extension of that statute's coverage. Thus the Senate Committee said that the principal purpose of the Amendments was "to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate administrative reforms," Sen. Rep., *supra*, p. 1.

The change in the coverage section was dramatic. Before amendment the first sentence of 31 U.S.C. § 903 (a) read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

The Amendments altered this to read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the

> United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

In place of the definition of "employee" previously contained in § 902(3) as "not includ[ing] a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net," the Amendments defined the term as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

The definition of "employer," § 904(4)

> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

was modified by inserting after "navigable waters of the United States" the expansion of that term by the parenthetical phrase in § 903.[2]

Thus, under the Amendments there are two tests for coverage under the Act: a "situs" test requiring the injury to occur on the "navigable waters" as now defined, and a "status" test which requires that the employee be

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[2] The significance of this definition is that liability for compensation is predicated on being an "employer," 33 U.S.C. § 904.

"engaged in maritime employment," etc. While the situs test has been liberalized, the creation of an employee status test adds a new element to the coverage requirements.[3] The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in § 902(3)—"engaged in maritime employment" and "any longshoreman or other person engaged in longshoring operations."

II. The Facts

Two of the cases before us, relating to claimants Blundo and Scaffidi, concern the loading or unloading of containers; the other two, relating to claimants Dellaventura and Caputo, involve loading of ordinary cargo into consignees' trucks on the pier.

(1) *Blundo.* Claimant Blundo was employed as a "checker" by the International Terminal Operating Co. (ITO).[4] He was injured while checking cargo being removed from a container at the 19th Street pier in Brooklyn when he walked around a draft containing cargo to mark it, slipped on some ice and fell. He was working on the stringpiece within 30 to 40 feet of the water. The container he was checking had been unloaded a few days before at a different pier and then taken by a truckman over city streets to the 19th Street pier where it was opened by the United States Customs Office and then stripped. The Administrative Law Judge (ALJ) found that the 19th Street pier was not utilized by the employer for the actual loading or unloading of vessels but rather for the storage of commodities and for the "stripping,

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[3] Formerly, if an employee was not expressly excluded, as, e.g., a crew member; his injury occurring upon the navigable waters was compensable under the Act so long as his employer had "any . . . employees . . . employed in maritime employment, in whole or in part . . . ." 33 U.S.C. § 902(4) (1970).

[4] A "checker" checks the contents of a container carrying goods for several consignees against the bills of lading or other records.

or stuffing, *i.e.*, loading or unloading of containers." The BRB affirmed his findings as to the employee's status and the situs of the accident and upheld a compensation award under the LHWCA.

(2) *Scaffidi.* Claimant Scaffidi was employed by Pittston Stevedoring Corp. as a "hustler" operator, a kind of trucker who moves containers within a terminal. On March 12, 1973, Scaffidi drove a hustler loaded with containers of cargo from the Columbia Street Pier in Brooklyn, New York, through some ten blocks of public streets to Pier 12. On arriving at Pier 12 he backed the container to a receiving platform on the dock in preparation for loading the container on to the ship. When the container was opened, a large case fell out and injured him. The BRB affirmed the findings of the ALJ on the ground that the operator of a hustler used to transport containers within a terminal is enaged in an essential step in the overall process of loading cargo aboard a vessel, which was maritime employment as contemplated in 33 U.S.C. § 902(3). It found that the fact that the container had been transported over public streets was irrelevant.

(3) *Dellaventura.* Claimant Dellaventura, employed by Pittston Stevedoring Corporation as a "sorter," was injured on June 27, 1973 at Pier 20 of the Pouch Terminal on Staten Island while helping to load a truck, belonging to a consignee, with coffee bags which had been offloaded from the ship "*CAMPECHE*" on or about February 16, 1973. Dellaventura sliped on some loose coffee beans while inside the truck. At times Dellaventura's responsibilities included going into the holds of ships to assist in sorting and loading or off-loading cargo. The accident occurred about 30 feet from the water's edge on the pier. The record affords no explanation for the consignee's 133-day delay in picking up the bags of coffee beans, but the ALJ found that the pier contained no warehouse facilities. The BRB affirmed his decision on

the grounds set forth in *Avvento* v. *Hellenic Lines*, BRB No. 74-153, 1 BRBS 174, 1975 A.M.C. 153 (Nov. 12, 1974), which held that " 'until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment.' "

(4) *Caputo.* Claimant Caputo was usually employed as "terminal labor" by Pittston Stevedoring Corp. When there was no work available at Pittston, he would take a "shape up" job as a longshoreman wherever it was available and on the day of the accident was working for Northeast Marine Terminal Co., Inc. at their terminal adjoining the water in Brooklyn. He was injured while helping a cargo consignee's truckdriver load boxes of cheese, discharged from a vessel at least five days previously, inside the consignee's truck; the injury occurred while he was rolling a dolly loaded with the cheese on it into the truck. Caputo and the employer stipulated that the work he was doing when injured involved the same risk as would obtain wherever and by whomsoever trucks were loaded or unloaded with dollies. But the ALJ found the stipulation lacked significance "in view of the situs where the injury actually occurred." The ALJ made an award in his favor and the BRB concurred.

III. Motion to Dismiss Petitions in Dellaventura's Case as Untimely.

Dellaventura and the Director, Office of Workers' Compensation Programs, U.S. Dept of Labor, (OWCP) by his attorney, the Solicitor of Labor, have moved to dismiss the petitions of the employer, Pittston Stevedoring Corp., and its insurance carrier, The Home Insurance Co., as untimely. We grant Dellaventura's motion, there-

by rendering it unnecessary to decide whether the Solicitor of Labor was entitled to make one.[5]

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[5] In the cases of Blundo and Caputo, petitioners named as a respondent the Director, Office of Workers' Compensation Programs in the Department of Labor; the petitions in Dellaventura's and Scaffidi's cases did not. The Director moved to amend the captions in the Dellaventura case, apparently for the primary purpose of enabling him to make the motion to dismiss; he made no similar motion to amend the caption in Scaffidi's case.

The issue whether the BRB should be a respondent in court of appeals review of its awards under 33 U.S.C. § 921(c) was treated in *McCord* v. *Benefits Review Board*, 514 F.2d 198 (D.C. Cir. 1975). There the BRB moved to dismiss the petition as to it. Petitioner did not oppose the motion and the court granted it, citing recent unreported decisions of the Ninth Circuit. The court reasoned that there was "sufficient adversity" between the claimant and the employer (or its insurance carrier) "to insure proper litigation without participation by the Board," that requiring the Board to participate "would parallel requiring the District Court to appear and defend its decision upon direct appeal" and that the presence of the second comma in 33 U.S.C. § 921(c) which reads:

> A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28.

indicated an intention that the Board should not be a party to the appeal. There were pending motions to substitute the Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor (OWCP), as a respondent which were not before the court of appeals. In the *I.T.O.* case, *supra*, the Board moved to be dismissed as a respondent and to have the Director substituted; the court granted the first branch of the motion but denied the second, 529 F.2d at 1088-89.

With respect, we cannot subscribe to the view that Congress intended to create what to us would seem a novel form of review of federal administrative action in which no one representing the Government would be a party. See F.R.App.P. 15(a) ("In each case the agency should be named respondent."). Prior to the 1972 Amendments judicial review took the form of a suit for an injunction in the district court against the deputy commissioner who made the order (former § 921(b)); in the absence of evidence of Congressional intent we find it hard to believe that, by providing internal review followed by an appeal to a court of appeals, Congress meant to oust the Government from further participation as of

right. Appearance as an *amicus* may not be good enough, since it normally does not allow oral argument and never allows an appeal.

Neither the *McCord* nor the *I.T.O.* court discussed § 921a which provides:

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

The existence of sufficient adversity between private parties has not been thought to preclude the Government's right to be a party in many other sorts of review of federal administrative action. The second comma, especially in a sentence with an inappropriate first one, seems a slender reed; the "other parties" phrase, means the other parties to the BRB review but does not rule out the BRB's being a party to review in the court of appeals. While Congress did not spell matters out with the same specificity as in 28 U.S.C. § 2348, we think it sufficiently indicated its intention that the BRB and other parties to the proceeding before the BRB should be parties to a review by a court of appeals under 33 U.S.C. § 921(c); if the BRB chooses to leave the defense of its order in a particular case to the prevailing private party, it is free to do so.

The administrative regulations do not specify which branch of the agency should be represented as respondent on appeal. 20 C.F.R. § 801.402 seems to contemplate that the BRB is the proper agency respondent in court of appeals review, since it provides that "except in proceedings in the Supreme Court" the representation of the BRB is provided by the Solicitor of Labor. Moreover, § 921a quoted above seems to contemplate that the BRB be represented in court of appeals review. However, 20 C.F.R. § 801.2(a)(10) defines "party" and "party in interest" to include the "Secretary or his designee . . . ." This would indicate that the Secretary of Labor shall determine what officer represents the agency in the court of appeals. The Government's position has been that the Director, OWCP is the proper respondent. The OWCP is an administrative, not a statutory, creation. See 20 C.F.R. §§ 1.1 et seq., and § 701.203. And the Solicitor of Labor is authorized to appear and participate on behalf of the Director, OWCP as an interested party before the BRB. 20 C.F.R. § 702.333(b). However, in the section assigning to the OWCP the responsibility for administering various programs, including the LHWCA, the OWCP is given administrative authority "except [for] 921 as it applies to the Benefits Review Board . . . ." 20 C.F.R. § 1.2(d).

Trying to make sense out of these regulations, we think that while the Director, OWCP is a proper party before the ALJ or the

The statute, 33 U.S.C. § 921(c), provides that a person adversely affected or aggrieved by a final order of the BRB may obtain review by the court of appeals for the circuit where the injury occurred "by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside." The BRB's order was issued on October 9, 1975, but the petition for review was not filed until February 5, 1976.

Petitioners' basis for resisting the motion is as follows: The BRB's Rules and Regulations, 20 C.F.R. § 802.403 (b), provide that the original of any BRB decision shall be filed with the Clerk of the Board, which was done here, and that "[a] copy of the Board's decision shall be sent by certified mail or served personally on all parties to the appeal and the Director." The rule does not say when this should be done. Apparently no such notice was sent to the employer or the insurance carrier but the attorney who represented both parties before the BRB and in this court acknowledges that he received a copy within the 60-day period and does not deny that he advised his clients.

Like 28 U.S.C. § 2344 and similar provisions in the statutes for the review of orders of other agencies, 33 U.S.C. § 921(c) makes the time for seeking review start to run from the entry of the agency's order, even though the agency is under a duty to give notice. See *Willow Crossing Dairy Farm* v. *Hardin*, 327 F. Supp. 798 (W.D. Pa. 1970) (where review section of Agricultural Adjustment Act provided for filing of review petition within

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BRB, see cases discussed in 3 *Larson, Workmen's Compensation Laws* § 83.19, at n. 49.1 (1976 ed.), the BRB is the proper agency respondent for review in the court of appeals, although the Solicitor of Labor could be designated to represent it. We deem it best to defer resolution of this question to a case where decision on this point is essential; perhaps in the meanwhile the Department will tidy up its regulations.

20 days of "entry" of judgment, word "entry" is to be interpreted normally and petition filed September 28 to review order of September 2 was not timely and did not vest the court with jurisdiction even though counsel for plaintiff did not receive notice of ruling until September 8). The BRB's regulations count the 60-day period from the date on which the decision is "filed," 20 C.F.R. § 802.410.[6] In the parallel situation of review of judgments of district courts in civil cases Rule 4(a) of the Federal Rules of Appellate Procedure likewise makes the entry of judgment the critical date; F.R.Civ.P. 77(d) directs the clerk to serve notice of the entry of a judgment or order but expressly provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure," namely, "upon a showing of excusable neglect."

We see no reason not to read 33 U.S.C. § 921(c) as meaning what it says. Cf. *United States* v. *Michel*, 282 U.S. 656 (1931); *American Construction Co.* v. *United States*, 107 F. Supp. 858 (Ct. Cl. 1952), *cert. denied*, 345 U.S. 922 (1953). The policy requiring that appeals be timely taken is so strong that ministerial failures by a

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[6] In the only case construing the statutory provisions for mail notice to the parties of the Deputy Commissioner's decision under the old act, 33 U.S.C. § 919, the Deputy Commissioner's first order was apparently neither filed in his office nor mailed to the parties. The court held, in response to the employer's argument that a second, more generous award was barred by the first award, that the first order "did not take on the dignity of an effective award." *American Mutual Liability Ins. Co. of Boston* v. *Lowe*, 13 F. Supp. 906, 907 (D.N.J.), *aff'd*, 85 F.2d 625 (3 Cir. 1936). We believe this case to be wholly distinguishable particularly since both opinions rest primarily on the failure to file a *signed* order. 13 F. Supp. at 907 (citing *Howard* v. *Monahan*, 33 F.2d 220 (S.D. Tex. 1929)).

clerk cannot be allowed to overcome it. The Act, like many other administrative review statutes, does not seem even to encompass the "excusable neglect" escape hatch provided for untimely appeals from the district courts. But even if it should be construed as doing so, this would be a most inappropriate case for granting relief. The clerk made the pardonable error of notifying the attorney rather than the parties, exactly what a clerk of a district court is directed to do, F.R.Civ.P. 5(b) and 77(d), and the attorney offers no explanation for having failed to file the petition within the allotted time.

IV. Motion to Dismiss Petition in Scaffidi's Case As Not Presenting a Justiciable Controversy.

In the proceedings up through the decision of the ALJ, the caption of this case named both Pittston and Gulf Insurance Company, its insurance carrier, as respondents; both were represented by the same attorney. After the ALJ's decision the insurance carrier paid the award and chose not to contest it further. Pittston then engaged its present attorney who altered the caption. Apparently the claimant made no point before the BRB that the carrier's payment of the award mooted the case; he does now. Despite the general rule that objections not raised before an administrative body cannot be raised on review, we must consider this one since it goes to our jurisdiction.

We see no basis on which a reversal of the BRB's decision would enable the insurance carrier to recover from Scaffidi a payment the liability for which it chose not to contest, and Pittston, which was invited to file a reply brief on the issue, does not suggest one. Cf. *Federal Insurance Co.* v. *Detroit Fire & Marine Insurance Co.*, 202 F. 645 (6 Cir.), *cert. denied*, 229 U.S. 620 (1913) (insurer which paid its share of loss and failed to join other subrogated insurers in third party suit held entitled to recover ratable share of damages won). Pittston

claims instead that it is nonetheless a "person adversely affected or aggrieved" by the BRB's order, 33 U.S.C. § 921(c), since the award will adversely affect its experience rating and thus increase its future premiums. Cf. *Travelers Insurance Co.* v. *Belair*, 284 F. Supp. 168 (D. Mass. 1968).

Pittston's contention that this interest affords it standing immediately encounters *Gange Lumber Co.* v. *Rowley*, 326 U.S. 295 (1945). The Court there held that the appellant-employer had failed to make a showing of substantial injury to any legally protected interest which would entitle it to question the validity under the due process clause of a state statute retroactively extending the time period in which workmen's compensation awards could be modified. Under the state's system, all awards were paid out of a state insurance fund supported by employer contributions of "premiums." Rejecting the employer's argument that its future premium rates would be adversely affected by the increased award, the Court held that the effect of any one accident was too minimal and its possible injury to the employer too speculative to establish the justiciability of the case.[7]

The *Gange* decision, however, has been severely criticized by Professor Davis. He notes that under the state statutes the employer was permitted to appeal, and characterizes the result as "unique," "the extreme one of denying the employer's standing even though the statute conferred such standing." 3 *Davis, Administrative Law Treatise* § 22.13, n.4 (1958). It may well be that under the more liberal concepts of standing developed in such

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[7] *Gange Lumber Co.* was followed in *Railway Express Agency* v. *Kennedy*, 189 F.2d 801 (7 Cir.), *cert. denied*, 342 U.S. 830 (1951) (denying employer standing to challenge unemployment compensation payments to striking workers from federal fund). Cf. 2A *Larson, Workmen's Compensation Law* § 77.30 (1976 ed.) (damage action by employer against negligent third party for increased premiums would lie).

cases as *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970), *Gange Lumber Co.* would not be followed. However, even on the standing issue alone, an overruling of *Gange Lumber Co.* would hardly carry the day for Pittston on this record where it has submitted nothing but conclusory assertions of adverse effect on future premiums.[8]

However all this may be, the liberalization of notions as to what makes a person "adversely affected or aggrieved" does not eliminate the requirement that in order for a controversy to be justiciable, the court must be able to afford effective relief. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, —— U.S. ——, 44 U.S.L.W. 4724 (June 1, 1976); *Warth* v. *Seldin*, 422 U.S. 490, 504-05 (1975); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971); *Local No. 8-6, Oil, Chemical & Atomic Workers Internat'l Union, AFL-CIO* v. *Missouri*, 361 U.S. 363, 367 (1960); *St. Pierre* v. *United States*, 319 U.S. 41, 42 (1943); *McKee* v. *Turner*, 491 F.2d 1106 (9 Cir. 1974). As indicated, Pittston has not claimed that Scaffidi will not retain his award even if we should reverse the BRB; what it is asking is simply an advisory opinion that the award should not have been made.[9] We do not doubt

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[8] There is no proof that payment of this one award would affect the premiums of such a large employer as Pittston. Moreover, we are not told whether the arrangements between Pittston and its insurance carrier allow the latter to take advantage of an award made without Pittston's consent in determining Pittston's ratings and, if so, whether a reversal by us would change matters.

[9] *Jaabeck* v. *Theodore A. Crane's Sons Co.*, 238 N.Y. 314, 318 (1924), cited by the petitioner in its reply brief, is wholly inapposite. A state workmen's compensation board had entered an award against both the employer and its insurer, one of the questions determined by the board being that of the insurer's liability under the insurance contract. The Appellate Division affirmed the award as to the employer but reversed as to the insurer on the ground that the policy did not cover the risk. The employer appealed to the Court of Appeals, which reversed the Appellate Divi-

that where insurance only partially covers the liability, the employer may appeal from a judgment even though the insurer has paid its part. See *Moore* v. *Columbia Casualty Co.*, 174 F. Supp. 566 (S.D. Ill. 1959); *Queen Ins. Co. of America* v. *Meyer Milling Co.*, 43 F.2d 885 (8 Cir. 1930). But where the issue of liability is determined against an insured and its insurer, and the insurer pays the damages in full even without the consent of the insured and chooses not to appeal, the insured cannot appeal from the judgment against him. *Ross* v. *Stricker*, 153 Ohio St. 153, 91 N.E.2d 18 (1950), discussed in 19 *Couch on Insurance 2d* § 78.228. In short, as the Supreme Court has said, albeit in a different context, once an insurer "has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name." *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 380-81 (1949); *Link Aviation, Inc.* v. *Downs*, 325 F.2d 613 (D.C. Cir. 1963). See also *Zauderer* v. *Continental Casualty Co.*, 140 F.2d 211 (2 Cir. 1944). This seems a reasonable application of the general rule that a party who has no interest in a fund cannot appeal from an order disbursing the fund. *Seaboard Surety Co.* v. *United States*, 306 F.2d 855 (9 Cir. 1962), and cases cited at 306 F.2d at 859, n.6. We therefore dismiss Pittston's petition.[10]

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sion with respect to the insurer, affirming in full the order of the State Industrial Board. The employer was clearly aggrieved by the order of the Appellate Division and the Court of Appeals gave effective relief by reinstating the order of the State Industrial Board.

[10] An additional reason for this conclusion is that once the insurance carrier has paid, without preserving its right to recover the payment by taking an appeal, the case lacks the necessary quality of adversariness. We see no reason why a person in Scaffidi's position should bother to defend against a petition to review or why the BRB or the Director should spend the Government's resources in such a case, even though that was done here.

V. Interpretation of the Statute

With these preliminaries out of the way, we can now undertake our main task—the interpretation of the coverage clauses of the 1972 Amendments.

Admitting as they must that the Amendments worked some extension of coverage, petitioners and the National Association of Stevedores (NAS), as *amicus curiae*, would limit this to factual situations generally comparable to those in *Nacirema Operating Co., Inc.* v. *Johnson*, 396 U.S. 212 (1969). There the Court held that the Act, as it then stood, did not cover longshoremen killed or injured on a pier while attaching cargo from railroad cars to ships' cranes for removal to the ships, although coverage presumably would have existed had they been hurled into the water, *Marine Stevedoring Corp.* v. *Oosting*, 238 F. Supp. 78 (E.D. Va. 1965), *aff'd*, 398 F.2d 900 (4 Cir. 1968) (en banc),[11] or injured on deck while performing part of the same operation, *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962). Resting its decision solely on statutory grounds, the Court said that "[t]he

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[11] *Nacirema Operating Co., Inc., supra*, reversed the *en banc* decision of the Fourth Circuit in *Marine Stevedoring Corp., supra*. Four cases were before the court of appeals in the consolidated appeal; in only three cases were petitions for *certiorari* filed and granted. Those three cases involved employees injured on the pier as described above whom the Deputy Commissioner had ruled were *not* covered by the LHWCA. The district courts had affirmed the Deputy Commissioners' denial of awards, and were reversed by the Fourth Circuit. In the fourth case (the title case in the court of appeals), the employee, also on the pier, had been injured while lifting a cable off the stern bollard of a vessel when it suddenly straightened, catapulting him into a river where he drowned. The Deputy Commissioner had found that the employee was covered under the Act, his award was affirmed by the district court and by the court of appeals, and it was not before the Supreme Court in *Nacirema*. Mr. Justice Douglas noted in his dissent that "[i]t is incongruous . . . that in an accident on a pier over navigable waters coverage of the Act depends on where the body falls after the accident has happened." 396 U.S. at 225.

invitation to move" the line dividing the coverage of LHWCA "landward must be addressed to Congress, not to this Court," 396 U.S. at 224. Petitioners argue that the BRB's rationale in effect reads the "status" requirement out of the Act by affording coverage to any longshoreman injured on a pier no matter what he is actually doing when injured.

The respondent employees, the International Longshoremen's Association (ILA), as *amicus curiae*, and the Solicitor of Labor (see note 5, *supra*) contend that the extension was much more substantial. Their position is that the process of unloading a vessel continues until the cargo is deposited on the consignee's truck on the pier (or begins, in the case of loading, when the goods are being removed from the delivery truck), and that anyone physically participating in this process is engaged in "maritime employment." We disagree with petitioners, without having to decide whether we would go to the full extent urged by their adversaries.

A.

We begin our analysis by remarking on the unsatisfactory state of the records before us, even if we include for this purpose the two petitions which we have dismissed. When cases of this nature began coming to the BRB shortly after the enactment of the Amendments, it should have realized that it was faced with a major task of statutory construction in determining what constitutes "maritime employment" or being a "longshoreman or other person engaged in longshoring operations"—which task could be performed satisfactorily only in the light of an extensive factual background detailing the structure of work on the various piers of this country. The following are illustrative of facts we would like to know but on which these records shed little or no light, even as regards the port of New York, let alone the rest

of the nation. Does one gang normally take cargo off or on the ship while another is responsible for transportation beyond the "point of rest"? Does the same gang always, sometimes, or often perform both jobs? Is all work on the pier normally conducted by a single employer or is there a division between the stevedore and the "terminal operator"? Even if there is only one employer, does he segregate the employees in their work assignments, by having different collective bargaining agreements or otherwise? Are separate charges made for services beyond the "point of rest" and, if so, for what? Does the "point of rest" shift about on the same pier? Just what is the normal practice for stripping and stuffing containers with goods belonging to different owners or destined to different consignees? Is this work normally done on the pier or in warehouses not adjoining navigable waters? What determines the choices? Does the hazardous nature of the employment stop at the point of rest or continue so long as the cargo is on the pier? Do the hazards change in frequency or degree as the longshoreman moves away from the water? The consolidation of several cases presenting different factual situations in a single large proceeding might have enabled the BRB to make meaningful distinctions. Instead of developing such a record and laying down guidelines for the ALJ's, the BRB has handled each case on an individual basis,[12] and without establishing any record support for the interpretive rules announced therein.

If we were sitting as a court of last resort, we would remand these cases to the BRB on our own motion with

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[12] We were told at argument that in the *I.T.O.* case the NAS tendered to the BRB a "Brandeis brief" intended to give the BRB some of the general information we have mentioned, outlining the division of labor in 45 ports in the United States; that the tender was rejected on the objection of the Solicitor on behalf of the Director, OWCP; but that the document was discussed at oral argument in the Fourth Circuit and has been referred to in other decisions of the BRB. We have not had even that much assistance.

directions to cause such a hearing to be held. But with the cases in their present posture in this circuit and others, we think it more helpful for us to state our views on what is now before us.[13]

B.

Perhaps the most useful way to approach the issue is to begin by discussing certain arguments we have not found to be particularly helpful.

(1) *The "presumption" of coverage, 33 U.S.C. § 920.* The claimants, the Solicitor of Labor, and the ILA place great reliance on a provision in the LHWCA as originally adopted in 1927, 33 U.S.C. § 920, and still in effect, that four things shall be presumed in the absence of substantial evidence to the contrary. One of these is "[t]hat the claim comes within the provisions of this chapter." 33 U.S.C. § 920(a). They contend that if the meaning of the new coverage provision, 33 U.S.C. § 903, is in any way doubtful, this presumption requires the doubt to be resolved in favor of coverage. We do not think this was what Congress had in mind; the very fact that the presumption can be overcome by substantial contrary evidence indicates its inapplicability to an interpretive question of general import such as this. See *Crowell* v. *Benson*, 285 U.S. 22, 64-65 (1932).

Even in cases holding that the accordion-like phrase "arising out of and in the course of employment," 33 U.S.C. § 902(2), could be widely stretched, the Court has done little more than mention the presumption, *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 474 (1947); *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361 (1965) (per curiam), resting its decision mainly on the principle with respect to the scope of

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[13] If one or more of the other circuits seized of this problem should order such a remand, we would entertain a petition for rehearing to enable us to do the same.

review discussed below. In *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), the Court did not rely on the presumption at all, even in the face of a strong dissent. The Court's decisions dealing with questions of coverage of the sort presented here will be searched in vain for any mention of the presumption, see, e.g., *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Norton* v. *Warner Co.*, 321 U.S. 565 (1944); *Calbeck* v. *Travelers Ins. Co., supra*, 370 U.S. 114 (1962); *Nacirema Operating Co., Inc., Inc.* v. *Johnson, supra*, 396 U.S. 224 (1969),[14] although in *Norton* and *Nacirema* coverage was rejected. The cases in this court, *Michigan Mutual Liability Co.* v. *Arrien*, 344 F.2d 640, 645-46 (2 Cir.), *cert. denied*, 382 U.S. 835 (1965), and *Overseas African Construction Corp.* v. *McMullen*, 500 F.2d 1291, 1296 (2 Cir. 1974), likewise treat the presumption as merely an embodiment of the "rule . . . that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." 500 F.2d at 1296. Here the question is not whether a line established by Congress is sufficiently elastic to include the claimant; the main issue is whether Congress placed the line at the "point of rest" or much further landward. Only if we have made the latter basic decision might the presumption come into play in ruling on cases near the border. See *Davis* v. *Department of Labor*, 317 U.S. 249 (1942).

(2) *"Deference" to the BRB.* We likewise see no merit in the contention of claimants and the Solicitor of Labor that we are confined in our decision because of the def-

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[14] In *Davis* v. *Department of Labor*, 317 U.S. 249, 256 (1942), the Court noted that with respect to the largely "factual questions" relating to whether an employee injured within the "twilight zone" of federal jurisdiction established by the Court should be compensated under state or federal law, "presumptive weight" should be given to the findings of the federal or state administrator of the respective program, and relied in part on § 920(a).

erence owed to the BRB. We agree that the standard of review we must apply is that factual findings of the BRB are conclusive if supported by substantial evidence in the record considered as a whole since, as held in *Potenza* v. *United Terminals, Inc.*, 524 F.2d 1136 (2 Cir. 1975), it is of no moment that 33 U.S.C. § 921(b)(3) while applying this standard to the BRB's review of the ALJ's findings of fact does not expressly extend it to review in the court of appeals. But we are still confronted with the ever troubling question whether the determination at issue, namely, whether the 1972 Amendments should be so interpreted as to include these claimants, is the kind of question which justifies or requires judicial deference.

We think it is time to recognize, in line with Professor Kenneth Culp Davis' brilliant discussion, 4 Administrative Law Treatise §§ 30.01-.09 and the corresponding sections in the 1970 Supplement, that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand.[15] Leading cases supporting the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if

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[15] Our discussion of the Court's ambivalence with respect to deference is not to be read as dealing with two problems quite different from that here presented. One concerns an agency's exercise of power to formulate substantive rules, where the scope is wide, see, e.g., *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232 (1936); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), and the rules once issued, even if only in the form of guidelines, are "entitled to great deference," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 430-36 (1975). The other concerns an agency's construction of its own rules, see, e.g., *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *TSC Industries, Inc.* v. *Northway, Inc.*, —— U.S. ——, —— n.10 (1976), 44 L.W. 4852, 4855 n.10 (1976).

without rational basis are *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 146 (1939); *Gray* v. *Powell*, 314 U.S. 402, 411-12 (1941); and *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944). The rationale of these decisions was applied in the three "arising out of and in the course of employment" Supreme Court cases under the LHWCA—*Cardillo, O'Leary and O'Keeffe*, cited above. Indeed, the Court seems to have rejected the findings of the LHWCA's Deputy Commissioners only once since the statute was enacted, *Norton* v. *Warner Co.*, *supra*, 321 U.S. 565. However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term. Illustrative cases are *Office Employees International Union, Local No. 11, AFL-CIO* v. *NLRB*, 353 U.S. 313 (1957), and *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 150 (1944). In one of its most recent decisions on the subject, *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974), the Court held that "In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose"; this very nearly eliminates the "deference" principle as regards statutory construction altogether since if the agency's determination is found by a court to be consistent with the congressional purpose, it presumably would be affirmed on that ground without any need for deference.

There are several other reasons not to rest decision on the "deference" approach in these cases. One is that unlike the F.C.C. in the *Rochester Telephone* case, the Bituminous Coal Division of the Department of the Interior in *Gray* v. *Powell*, or the NLRB in the *Hearst* case, the BRB is not a policy making but entirely an umpiring agency. When Congress has charged an agency with the duty to make and implement a national policy, it is more likely that Congress intended the agency to have

some flexibility, free from judicial intrusion, in interpreting the Congressional grant. Compare *Rochester Telephone Corp.* v. *United States*, *supra*, 307 U.S. at 146; Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968). A second factor is the way in which the agency has gone about its job. As suggested above, we would be much more inclined to defer to a considered judgment of the BRB rendered on a full record than to this series of short opinions on isolated facts which contain no in-depth study of the problem. A somewhat related point is that although the BRB's decisions have been "consistent and contemporaneous," the issue arose almost immediately after the 1972 Amendments became effective at a time when the BRB had little experience in the administration of the Act; yet its initial decisions, surely not the result of any great expertise, became the basis for all the others. "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Finally, this is a case where understanding of the statute depends in no small measure on prior judicial decisions and legislative history—subjects on which a court has a greater competence than the BRB. We therefore reject the argument that the BRB's decisions in these cases must be affirmed if they are rational but wrong.

(3) *Other definitions.* We likewise give little weight to arguments made on both sides which are based on definitions of "longshoreman" or maritime employment or contracts formulated in different contexts and for different purposes. The ILA relies on Congress' approval, Act of Aug. 12, 1953, ch. 407, 67 Stat. 541, of definitions (reproduced in the margin)[16] in a compact between New

[16] See ILA Amicus brief at 5-6 n.1. The definitions in the Bi-State Compact can be found at § 9806 of McKinney's Unconsolidated New York Laws and § 32:23-6 of N.J.S.A.

[Footnote continued on page 28a]

York and New Jersey creating the bi-state Waterfront Commission. To assume that the 1972 Congress had in mind this action of its predecessor of 1953 is to attribute a degree of acumen few Congressmen would claim. Beyond that, the purposes of the two enactments were quite different; it is for that reason that paragraph (1) of the Waterfront Commission Act includes persons, notably clerical workers, clearly not embraced under the most liberal construction of the 1972 Amendments.

On the other hand, a narrow definition of "longshoring operations" [17] formulated by the Secretary of Labor in

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[16] [Continued]

"Pier" shall include any wharf, pier, dock or quay.

"Other waterfront terminal" shall include any warehouse, depot or other terminal (other than a pier) which is located within one thousand yards of any pier in the Port of New York district and which is used for waterborne freight in whole or substantial part.

"Longshoreman" shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or

(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores . . . .

"Stevedore" shall mean a contractor (not including an employee) engaged for compensation pursuant to a contract or arrangement with a carrier of freight by water, in moving waterborne freight carried or consigned for carriage by such carrier on vessels of such carrier berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals.

[17] * * * the loading, unloading, moving or handling of cargo, ships stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States.

25 Fed. Reg. 1566 (1960), 29 C.F.R. 9.3(i).

1960 as part of safety regulations issued in respect of "all employments covered by this chapter," 33 U.S.C. § 941(a), is likewise not dispositive of the meaning of the words used in the Amendments since under the old statute covered employment was limited to injuries occurring "upon the navigable waters of the United States (including [only] any drydock)." And despite the definition of "carriage of goods" as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship" contained in the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1301(e), we have held that the contract of carriage, obviously a maritime contract, persists after unloading and that the carrier remains liable, not as a carrier but as a bailee, until it delivers the cargo to the consignee or places it in a public dock or warehouse. *David Crystal, Inc.* v. *Cunard Steamship Co.*, 339 F.2d 295, 298 (2 Cir. 1964), *cert. denied*, 380 U.S. 976 (1965); *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 811-12 (2 Cir. 1971); *Cameco, Inc.* v. *S.S. American Legion Lines*, 514 F.2d 1291, 1295-96 (2 Cir. 1974).

(4) *Liberal construction of remedial legislation.* There is more force in the contention of the claimants and the Solicitor that a broad reading of the 1972 Amendments is required by the oft-iterated principle that remedial legislation should be construed liberally. The Supreme Court said, as to this very statute, although in a quite different context, *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953):

> This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.

Petitioners do not altogether overcome this point by arguing that a statute must be construed with reference to the mischief intended to be overcome, see *Heydon's*

Case, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584), and that all that Congress intended to "remedy" was the unjust result of *Nacirema Operating Co.* v. *Johnson*, *supra*, 396 U.S. 212, by accepting the invitation which, pursuant to Mr. Justice White's suggestion, the unions extended to it.[18] The statutory language can fairly be read to do more than that and thus the liberality principle tends in favor of such a reading.

C.

With this background we address ourselves, at long last, to the words of the statute with the aid of the legislative history. There is no question that claimants met the situs test of § 903(a),[19] and concededly all worked

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[18] The argument, in fact, flounders on a number of points. The invitation issued in *Nacirema* was broadly phrased:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U.S. at 223-24. The Court contemplated at least two possibilities: an extension of the LHWCA to cover longshoremen injured on a pier "while loading or unloading a ship," or an extension to "coincide with the limits of admiralty jurisdiction." In the absence of clarifying legislative history, we would have no idea which set of evils referred to in *Nacirema* Congress was endeavoring to overcome.

[19] In the Blundo case the petitioner, I.T.O. makes a halfhearted argument that Blundo was not injured on the navigable waters within the expanded definition because the 19th Street pier on which he

for covered "employers" under the Act; the question is whether each—now Blundo and Caputo—was a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . ." § 902(3).[20]

If there were any doubt on the face of the statute, the legislative history makes clear that § 902(3), as here relevant, is to be construed no differently than if it said "any longshoreman or other person engaged in longshoring activity or engaged in other maritime employment." Cf. *Argosy Limited* v. *Hennigan*, 404 F.2d 14, 20 (5 Cir. 1968); *United States* v. *Gertz*, 249 F.2d 662, 666 (9 Cir. 1957). The Senate Committee on Labor

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was injured was not used for the loading or unloading of vessels. This argument flies in the face of the statute, which reads ". . . including *any* adjoining pier . . . *or other adjoining area* customarily used by an employer in loading, unloading, repairing, or building a vessel." (Emphasis added.) It would seem that any pier next to the water is included within the situs definition. Accord, *I.T.O. Corp. of Baltimore* v. *Adkins*, *supra*, 529 F.2d at 1083-84. The testimony before the ALJ established that Blundo was injured at one of two "finger" piers which jutted into the water from the terminal. The entire terminal adjoined the water and was enclosed by a single gate. The finger pier at 21st Street was used for vessels; the finger pier at 19th Street was used to load and unload containers. Blundo was clearly on a "pier" and a "terminal" adjoining the water, a part of which was used for loading and unloading vessels. This is sufficient.

[20] Judge Craven, dissenting from the panel opinion in *I.T.O.*, advanced the argument, although he did not base his conclusion on it, that this phrasing might make the inquiry too narrow, since § 902(3) also includes "any harborworker," 529 F.2d at 1090 n.3. He cited the statement in 1 *Norris, The Law of Maritime Personal Injuries* § 3 (3d ed. 1975), that the longshoreman is only "[f]irst in the catalogue of harbor workers." Arguably, however, Congress intended "harbor workers" to refer only to persons similar to those specifically described ("any harborworker including a ship repairman, shipbuilder, and shipbreaker") and not to persons concerned with the movement of cargo. But see *Norris*, *supra*, § 5. Like Judge Craven we find it unnecessary to decide the point.

& Public Welfare stated, Sen. Rep. No. 92-1125, 92d Cong. 2d Sess., at 13:

> It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.
>
> The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The House Committee Report, No. 92-1441, 92d Cong. 2d Sess. contained identical language.

Secondly, and more important, Congress perceived a need to provide expressly for coverage for "any longshoreman" in addition to what it had established for a person engaged in "longshoring operations." A "longshoreman" may thus be covered at some times even when he is not engaged in traditional longshoring activity. This alone is sufficient to condemn the "point of rest"

doctrine. Petitioners concede that persons engaged in moving unloaded cargo to its first point of rest or moving cargo to be loaded from its last point of rest are engaged in "longshoring operations." If they alone were to be covered, there was no need to provide also for "any longshoreman."

What then did Congress mean by that phrase? Obviously it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards. But see *Weyerhaeuser* v. *Gilmore*, *supra*, 528 F.2d at 962.

The reports of the Senate and House committees go a long way toward supplying an answer. Immediately after the two paragraphs quoted above came the following:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of

> cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work. in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

Two conclusions emerge from this with seeming certainty: One is that Congress was concerned about "the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels," new facts of life on the waterfront which, as this court noted in *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884, 886 (2 Cir. 1970), mean that a good deal more of the longshoreman's traditional jobs are now performed on shore. Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds. Congress intended to cover men engaged in these activities if they met the situs test contained in the Act—irrespective of the employee's position vis-a-vis a "point of rest." The committees said expressly that "checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." Congress did not say they were covered only if they "unloaded the container at the stop where a crane had first deposited the container or loaded it at a place on the water's edge; one of the advantages of containers is that they permit loading or unloading to be done at less congested locations. It sufficed for cover-

age if an accident arising from the stripping or stuffing of containers occurs at a place within the situs test. One answer to petitioners' argument that stuffing or stripping a container on a pier is no different from doing the same job a mile away is that Congress may have doubted its power, under the admiralty clause of Article III, to go further than it did. This would decide Blundo's case if he had been "checking" the container at the pier where it was first deposited even if it had been moved several times. We fail to perceive any significant difference because, for the convenience of someone, it had been moved to another pier. The cargo had not yet been delivered to the consignee; the unloading process still had not been completed.[21]

The second conclusion is that Congress was concerned with providing uniformity of coverage for persons engaged in the loading or unloading functions on the piers. It wished to minimize the occasions when longshoremen and other harbor workers would be walking from the liberalized benefits of LHWCA to the much lower ones provided by state compensation laws.[22] Petitioners argue

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[21] As many admiralty cases have decided, in construing other doctrines of maritime law, a realistic view of the loading or unloading process recognizes that it does not stop as soon as the cargo first hits the pier on being removed from a vessel, nor does it begin only when the cargo stands on the pier next to the vessel on which it is about to be loaded. See *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 214 at n.14 (1971), *rev'g on other grounds Law* v. *Victory Carriers, Inc.*, 432 F.2d 376 (5 Cir. 1970). Frequently large gangs of longshoremen, dozens of men, are assigned different tasks in a continuous process which moves cargo off a vessel ultimately to a warehouse or storage area at the far end of the pier or terminal. *Garrett* v. *Gutzeit*, 491 F.2d 228 (4 Cir. 1974).

[22] Joseph Leonard, Safety Director of the ILA, in speaking to the House Committee about the former coverage provisions, asked, "What do we do, cut ourselves in half?" Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972), before the Select Subcomm. on Labor of the House Comm. on Educ. & Labor, 92d Cong., 2d Sess., 297.

that Congress was concerned with providing uniformity only in the *Nacirema* situation, where the same employee engaged in the same unloading or loading operation would have been protected by the federal statute if a draft of cargo hit him while he was on the ship but not if his injury occurred on the pier itself, and point to the fact that the illustration used by the committees was a case where cargo is "unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters." But the committees stated their intention more broadly—"to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." The concern for uniformity was not limited to rectifying the disparity between the longshoreman making up the draft on the ship and the longshoreman receiving it on the pier; it extended to the disparity that would result if a line were drawn between the latter and a longshoreman, perhaps the very same one, who moved the unloaded cargo to another place on the pier.[23] The committee's language clearly is broad enough to cover a person like Caputo who spent a significant part of his time in working on vessels, so long as he did not come within the category mentioned as being excluded—employees who are not engaged in loading or unloading a vessel, "[t]hus, employees whose responsibility is only to pick up stored cargo for further trans-shipment."

Petitioner asserts that Caputo came within both descriptions of excluded persons. Clearly he did not come within the second. His responsibility was to perform a variety of jobs on the pier, on both sides of the "point of rest," including going on vessels. Also we would not

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[23] Congress also expressed interest in extending federal coverage to as many longshoremen as possible to avoid the "disparity in benefits payable . . . for the same type of injury depending on . . . in which State the accident occurs." Senate Committee Report, *supra*, at 12.

regard the cargo as "stored" within the committees' meaning simply because the consignee had delayed five days in picking it up.[24] The question whether he was engaged in loading or unloading (here unloading) is closer. If his injury had occurred while he was moving the boxes of cheese from a previous position on the pier to the consignee's trucks, he clearly would have been engaged in "unloading," in the way that term is used in ordinary speech. That being so, it would be wholly artificial to draw a distinction because his injury occurred while he was inside the consignee's truck. See note 21, *supra*. To be sure, the carrier would probably have fulfilled its legal duty if it had instructed the stevedores simply to place cargo alongside consignees' trucks and leave the loading of the trucks to them. But, so far as we can gather from this meagre record, that is not the life of the waterfront. The driver needs help in loading or unloading his truck, it would be uneconomical for him to carry a sufficient supply of helpers, everyone wants the truck off the pier as soon as possible, so the stevedores have their employees lend a hand. It is not clear whether an additional charge is collected for this, but we do not think it matters. Neither do we think it matters that the stevedore might not be liable for mishandling by a longshoreman within the truck.

Petitioners make a significant argument that the high benefits under the Amendments were provided because of the extremely hazardous nature of longshoring and that these extraordinary hazards no longer exist once the cargo is beyond the "point of rest." Indeed, in Caputo's case the parties stipulated that what Caputo was doing was the same, and entailed the same risk of injury,

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[24] We thus are not required to decide whether cargo should ever be regarded as "stored" so long as it remains on the pier in the custody of the stevedore employed by the vessel rather than being placed in a public warehouse. Dellaventura's case, where there was a delay of 133 days, might have demanded such a decision.

as exists wherever and by whomsoever trucks are loaded or unloaded with dollies. The Senate Report, p. 2, refers to "high-risk occupations such as those covered by this Act" and says that "[l]ongshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations." What we do not know is what types of operations were considered to be longshoring for the purpose of these calculations. Also, as shown by the case of Blundo, who slipped on ice while he was checking the contents of a container that was being stripped on a pier other than the one where the vessel was unloaded, unusual hazards can exist due to the exposure of piers to the elements which would not exist in a manufacturing plant or in a garage or warehouse where containers removed from trucks were being stripped. Doubtless the hazards of longshoring vary with the particular tasks being performed, and may in some instances be no greater than those encountered by persons doing similar work in places other than piers or terminals adjoining the water's edge.[25] However all this may be, we find nothing in the words of the statute or its legislative history that would enable us to construct a "hazard" test; Congress' intention was rather to provide uniformity of coverage for workers injured while engaged in the process of loading or unloading ships who met the situs test. We note in this connection that the increased benefits inure to shipbuilders meeting the situs test, although much of their work is performed in facilities no more hazardous than those not within the expanded definition of "navigable waters" and that the benefit schedules of LHWCA apply to all industrial accidents in the

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[25] But see the statement of Representative Hicks of Massachusetts on the floor of the House. 118 Cong. Rec. 36387 (Oct. 14, 1972). And see House Hearings, supra note 22, at 288-89 (statement of Patrick Tobin, Internat'l Longshoremen's and Warehousemen's Union (ILWU)).

District of Columbia, Act of May 17, 1928, ch. 612, 45 Stat. 600 (1928), 36 D.C. Code § 501 (1973).

In a variation of the argument last considered, petitioners contend that because of the higher benefits payable under LHWCA than under state compensation acts, construing the Amendments to apply beyond the point of rest will increase the already high expenses of stevedores to an extent that Congress could not have intended. Clearly, as explained at the outset, the act was a trade-off—a gain to the stevedores in doing away with the *Sieracki-Ryan* triangle, a gain to the workers in higher benefits and in moving the *Jensen* line shoreward. Just how much added cost Congress meant to impose on stevedores by the second part of the bargain is impossible to determine.[26] What is clear is that Congress had a profound distaste for a regime in which employees engaged in the rough and tumble work described in the Amendments should be covered under the Federal Act at one moment and under state acts at another.

We therefore hold that the Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee has stopped his vehicle at the pier), provided in the latter instances that the employee has spent a sig-

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[26] It is worth noting that the increased benefits provided by the Amendments followed recommendations of the National Commission on State Workmen's Compensation Laws (Sen. Rep., p. 4), and that Congress may well have expected that enactment of the Amendments would have an effect on state compensation laws. Hearings on S. 2318, S. 525, and S. 1547 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972) before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., at 74 (statement of James O'Brien, Ass't Dir. Soc'l Sec. Dep't, AFL-CIO), 149 (statement of Joseph Leonard, Safety Director, ILA).

nificant part of his time in the typical longshoring activity of taking cargo on or off a vessel. That is as far as we need to go to affirm Blundo's and Caputo's awards; whether the proviso is essential can be left for another day.

Petitioners say, as indicated above, that in effect our construction reads the status requirement out of the Act. We concede it goes some way in that direction. But it does not do so completely; we part company with Gilmore & Black when they assert that the commitee reports should be disregarded and the Amendments then "can fairly be read to cover all employment-related injuries which occur within the Act's territorial limits." The Law of Admiralty, § 6.51 at 430 (1975).[27] We believe our position avoids some of the more problematic possibilities lurking in the new "status" requirement, and accords with the liberal interpretation which must be given this remedial statute and its remedial amendments. See Comment, Broadened Coverage Under the LHWCA, 33 La. L. Rev. 683, 693 (1973).

VI. Constitutionality

In so construing the Amendments we have necessarily assumed that the construction would be constitutional. We think that assumption is well founded.

It is beyond dispute that "Although containing no express grant of legislative power over the substantive law, the provision [of Article III as to admiralty and maritime jurisdiction] was regarded from the beginning as

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[27] They add that "a female secretary who works in a terminal warehouse should qualify as a LHCA harbor worker in exactly the same way that a female hairdresser in a cruise ship's beauty salon qualifies as a Jones Act seaman." *Id.* We do not find the analogy persuasive. Cruise ships encounter rough weather and may even sink; terminal warehouses don't. Cf. *Malramas* v. *American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2 Cir. 1973).

implicitly investing such power in the United States." *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 386 (1924). The classic definition of the jurisdiction was Mr. Justice Story's in *DeLovio* v. *Boit*, 7 Fed. Cas. 418, 444, Case No. 3776 (C.C.D. Mass. 1815) that it "comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality, the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." Mr. Justice Story used the broad term "locality" in his definition of the jurisdiction with respect to "torts, and injuries." Although the Supreme Court later defined locality as including only injuries suffered on navigable waters and not injuries on the land caused by a vessel, *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866), the Court has acquiesced in Congress' overruling that holding by the Admiralty Extension Act, 46 U.S.C. § 740, which was applied without question in *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963). See also *United States* v. *Matson Navigation Co.*, 201 F.2d 610 (9 Cir. 1953), cited with approval in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 209 n.9 (1971), in which the Court stated that "if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution." *Id.* at 216.[28] Most important of all are the statements in *Nacirema*, *supra*, 396 U.S. at 223, that "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship," and the suggestion that Congress

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[28] The Court has also sustained the Jones Act, which accords to seamen a remedy for injuries on land as well as on the sea, as an extension of the remedy of maintenance and cure. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 40-41 (1943). If *Sieracki* retains any vitality, the constitutionality of the extension of coverage by the Amendments could be supported on this theory.

be invited to do something about this, *id.* at 397. The Court would scarcely have suggested this if it had entertained doubt as to the constitutionality of a Congressional response.

We thus see no reason to question the power of Congress to expand the concept of a maritime tort to include injuries suffered by persons on structures adjoining navigable waters in the course of employment related to ships. If we were more doubtful on the point than we are, we would see no reason why the extension of coverage could not be predicated on the portion of the jurisdiction relating to maritime contracts, where there is no "locality" test. Contracts of employment relating to maritime matters are within that jurisdiction, *Sheppard* v. *Taylor*, 30 U.S. (5 Pet.) 675 (1831), and claims under LHWCA are by an employee engaged in "maritime employment" against an employer.

The petition to review in Dellaventura's case is dismissed as untimely and the petition in Scaffidi's case is dismissed on the ground that there no longer is a justiciable controversy between the employer and the employee. The petitions in Blundo's and Caputo's cases are denied on the merits.

LUMBARD, Circuit Judge (concurring and dissenting):

I agree that Pittston's petition seeking review of the award in Scaffidi's case should be dismissed as there is no justiciable controversy by reason of the insurance carrier's payment of the award. I also agree that Pittston's petition to review Dellaventura's case should be dismissed as untimely filed.

With respect to the denial of the petitions in the Blundo and Caputo cases, I respectfully dissent. As the relevant

considerations have been so ably and extensively set forth here by Judge Friendly and also by Judge Winter in I.T.O. of Baltimore v. Benefits Review Board, U.S. Dep't of Labor and Adkins, 529 F.2d 1080 (4th Cir. 1975), no purpose would be served in any further protracted discussion. I agree with Judge Winter that "[t]he 1972 extension of coverage was intended only to remove inequities and anomalies arising when a person otherwise engaged in 'maritime employment' was injured on land," 529 F.2d at 1081, and with his additional statement that ". . . with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in [such] loading or unloading functions,'" 529 F.2d at 1088.

It is more in keeping with the realities of maritime employment to draw the line at the first point of rest in discharging the cargo and at the last point of rest in loading a vessel. Moreover, such a rule is far easier to apply and avoids claims such as that put forward by Dellaventura that he is entitled to compensation for his injury while loading a consignee's truck with coffee bags which had been stored in a warehouse for 133 days after being removed from the ship CAMPECHE. This being so, it seems to me that the interpretation adopted by the Fourth Circuit is more consistent with what the Congress intended and with the language of the 1972 amendment.

Blundo, a checker employed by I.T.O., was injured while checking cargo being removed from a container. The container was located on a stringpiece of the 19th Street pier in Brooklyn, had been unloaded a few days before at a different pier and had been trucked through the streets to the 19th Street pier to be opened there by United States Customs before the container was stripped.

What Blundo did was done well after the container had been left at the first point of rest.

Caputo's principal duties related to terminal labor. When injured he was working at the northeast marine terminal on the Brooklyn waterfront inside the truck of a consignee, while helping the consignee's truck driver load boxes of cheese which had been discharged from a vessel at least five days before. Thus in Caputo's case his activity occurred after the boxes of cheese had come to rest on the pier.

For these reasons I would grant the petition and set aside the awards in the cases of Blundo and Caputo.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of July, one thousand nine hundred and seventy-six.

Present: HON. J. EDWARD LUMBARD
HON. HENRY J. FRIENDLY
HON. JAMES L. OAKES
Circuit Judges.

75-4043, 75-4249
76-4009, 76-4042

PITTSTON STEVEDORING CORPORATION,
Petitioner

v.

JOHN SCAFFIDI,
Respondent.

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT MADE BY CARMELO BLUNDO,
Claimant-Appellee

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,
Self-Insured Employer-Appellant

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

NORTHEAST MARINE TERMINAL COMPANY, INC.,
and STATE INSURANCE FUND,
Petitioners

v.

RALPH CAPUTO, and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PITTSTON STEVEDORING CORPORATION and
THE HOME INSURANCE COMPANY,
Petitioners

v.

ANTHONY DELLAVENTURA, and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

Petitioners for review of orders of the Benefits Review Board of the Department of Labor.

This cause came on to be heard on the administrative record of the Benefits Review Board and was argued by counsel.

Upon consideration thereof, it is now hereby ordered, adjudged and decreed that said petitions be and they hereby are dismissed in part and denied in part in accordance with the opinion of this court with costs to be taxed against the petitioners.

A. DANIEL FUSARO
Clerk

By /s/ Vincent A. Carlin
Chief Deputy Clerk

APPENDIX B

BRB No. 75-142

CARMELO BLUNDO
Claimant-Respondent

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party in Interest

DECISION

Appeal from Decision and Order of Patrick G. Geraghty, Administrative Law Judge, United States Department of Labor.

Leonard J. Linden (Linden and Gallagher), New York, New York, for employer.

Angelo C. Gucciardo (Israel, Adler, Ronca and Gucciardo), New York, New York, for claimant.

Ronald Meisburg (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Miller, Member:

This appeal by the employer seeks review and reversal of a Decision and Order (75-LHCA-157), and a subse-

quent Order by which the first was amended, of Administrative Law Judge Patrick G. Geraghty. The claimant was awarded compensation for temporary total disability, interest, medical expenses and attorney's fees. The employer was credited with amounts already paid to the claimant pursuant to the compensation statute of the state of New York. The claim was filed pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act).

The claimant sustained injuries to his back and head on January 8, 1974, while working as a checker with a crew of men who were stripping a container at the 19th Street Pier, within the employer's terminal at Brooklyn, New York. The containers which were stripped at the time of injury had been off-loaded from a vessel some time previously, apparently by employees of another company, and brought to the I.T.O. Co. terminal by truck for stripping.

The administrative law judge found that the claimant's injury occurred within both the "status" and "situs" jurisdiction of the Act and awarded compensation accordingly. In this appeal, the employer contests these findings, contending that at the time of injury, neither the employer, the employee or the place of injury was within the jurisdiction of the Act and that finding this claim to be within the jurisdiction of the Act is unconstitutional.

The Board rejects the employer's arguments and agrees with the administrative law judge. This injury did occur under circumstances which are within the jurisdictional requirements of Section 2(3), (4) and 3(a) of the Act. 33 U.S.C. §§ 902(3), (4), 903(a).

It is argued that the claimant was not engaged in maritime employment at the time of his injury, and so was not an "employee" within the meaning of Section

2(3), because the container being stripped had been brought to the employer's terminal by a trucking company over public streets and that once delivered to this trucking company, the container was being moved for trans-shipment and had left maritime jurisdiction. The Board has consistently held that stripping containers, which may have been off-loaded from a vessel some days earlier, is a longshoring operation, part of the over-all process of unloading a vessel, is maritime employment and a person engaged in this activity is an "employee" within the meaning of Section 2(3). *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 2 BRBS 99, BRB No. 74-231 (July 30, 1975). The fact that the claimant was a checker rather than a longshoreman actually engaged in removing cargo from a container does not remove him from the Act's coverage; the legislative history of the Act specifically indicates intent that checkers be covered. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. 92-1441, 92d Cong., 2d Sess. 11 (1972). The fact that the container had been removed from a ship at one location and transported to another location for stripping does not take it out of maritime commerce. *See Stockman, supra.* Cargo remains in maritime commerce until it is delivered to a consignee for further trans-shipment and moving a container from one location to another for the purpose of stripping, removing its contents in preparation for delivery to consignees, is not itself "further trans-shipment" so as to take it out of maritime commerce.

The employer contends that it is not an "employer" within the meaning of Section 2(4) because it was not engaged in unloading a vessel at the 19th street pier at the time of the claimant's injury. Since the claimant and his co-workers were engaged in a longshoring operation, maritime employment, the employer is an "employer" as defined in Section 2(4). *Harris* v. *Maritime Terminals, Inc.*, 1 BRBS 301, BRB No. 74-178 (Feb. 3, 1975).

The employer's argument that the place of injury, the 19th Street Pier, is not within the jurisdiction of the Act, is without merit. The claimant was injured within the confines of the employer's terminal, adjoining navigable waters. Such a terminal is within the "situs" jurisdiction of the Act. *Lopez* v. *Atlantic Container Lines, Ltd.*, 2 BRBS 265, BRB No. 75-117 (Sept. 9, 1975). Since the claimant was injured within a terminal customarily used by an employer in loading or unloading vessels, even though at a neighboring pier rather than the specific pier where the claimant was working, the jurisdictional requirement of Section 3(a) is satisfied. *See Harris* v. *Maritime Terminals, Inc., supra.*

The employer's final argument, that finding this claimant to be covered requires an unconstitutional interpretation of the Act, must be rejected. The Board's views on this subject have been adequately discussed in a prior opinion. *Coppolino* v. *I.T.O. Co., Inc.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974).

The Decision and Order, as amended, of the administrative law judge, is affirmed in all respects.

Dated this 30th day of October, 1975.

APPENDIX C

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D.C. 20210

Case No. 75-LHCA-157

(Formerly No. 2-31357)

In the Matter of

CARMELO BLUNDO,
Claimant

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,
Employer (Self-Insured)

Angelo C. Gucciardo, Esquire
Israel, Adler, Ronca & Gucciardo
160 Broadway
New York, New York 10038

For the Claimant

Leonard J. Linden, Esquire
Linden & Gallagher
20 Vesey Street
New York, New York 10007

For the Employer

Ronald Meisburg, Esquire
William J. Kilberg, Solicitor of Labor
Marshall H. Harris, Associate Solicitor of Labor

By Brief

For the Director, Office of
Workers' Compensation Programs

Party in Interest

Before: PATRICK G. GERAGHTY
Administrative Law Judge

Decision and Order

This is a proceeding held pursuant to the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter cited as the Act), on a claim for compensation benefits filed by Carmelo Blundo (hereinafter referred to as Claimant) under the Act. The case is before this Administrative Law Judge for formal hearing and decision, as is provided by the Act and the Rules and Regulations implementing said Act, 20 C.F.R. § 701 and 702.

After due notice to the Parties, a formal hearing was held, on this matter, on December 11, 1974, in New York City, New York. The Claimant was present and was represented by his Attorney, Angelo C. Gucciardo, Esquire. The Employer, who is Self-Insured, was represented by its Counsel, Leonard J. Linden, Esquire. Counsel were afforded full opportunity to present evidence, to call, examine and cross-examine witnesses.

Counsel from the Office of the Solicitor of Labor was not present at the formal hearing; however, the Solicitor has filed a Brief on behalf of the Director, Office of Workers' Compensation Programs, a Party-in-Interest, pursuant to 20 C.F.R. § 702.333(b). Counsel for the other Parties have also submitted Briefs in support of their respective positions and Counsel for Employer has also submitted a memoranda in reply to the Briefs filed by the Claimant and the Solicitor. In addition, Counsel for Claimant has submitted a petition for allowance and in support of a reasonable attorney's fee. All these documents have been duly considered and they are hereby incorporated into this record.

Stipulations of the Parties

At the commencement of this formal hearing, Counsel for the Parties stipulated and agreed that there was no dispute as to the following matters:

1. The Claimant sustained his injury on January 8, 1974, while in the employ of the Employer and within the course of said employment.

2. There was timely notice, both of the injury and of this claim.

3. The Claimant, as a result of said injury was temporarily totally disabled from January 9, 1974, to February 1, 1974, for which period Employer has paid to Claimant $285.00, as compensation benefits pursuant to the New York State Workmen's Compensation Statute, less two (2) days worked.

4. The Claimant's average weekly wages, at time of injury, were $257.69, for a compensation rate of $171.79 per week.

5. The Claimant sustained an accidental injury to his head and lower back, while working as a checker at Employer's pier facility, located at 21st Street, Brooklyn, New York.

These stipuations and agreements are accepted and these matters are, therefore, considered established.

Issues

There are two questions presented for resolution: (1) Did the Claimant sustain his injury in an area within the jurisdiction of the Act; (2) Was the Claimant, at the time of injury, an "employee" within the meaning of the Act?

Decision

It is argued that the Claimant is not entitled to compensation benefits under the Act, as he did not sustain his injury in a place within the jurisdiction of the Act.

In the 1972 Amendments to the Act, Congress expanded the situs test [1] by providing that:

> Compensation shall be payable under the Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.*) (Emphasis added).[2]

Thus, Congress has modified the original situs requirement, expanding the physical locus of the Act's jurisdiction to include injuries incurred on shoreside facilities.

The Claimant, on the date of his accident, was employed at Employer's facility, commonly known as 21st Street Pier, which is located in Brooklyn, New York. This enfenced facility encompasses an area 1,000 feet by 700 feet, between 19th and 21st Streets. As reflected in this record, there are apparently two (2) finger-piers at the facility, termed respectively: the 19th Street Pier and the 21st Street Pier. The pier at 21st Street can berth approximately five (5) ships, for purposes of loading or unloading. The 19th Street Pier, however, is not

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[1] Prior to the 1972 Amendments, situs requirements restricted coverage to injuries occurring on the navigable waters of the United States. 33 U.S.C. § 903(a), 44 Stat. 1426 (1927); *Travelers Ins. Co.* v. *Shea*, 382 F.2d 344 (5th Cir. 1967), *cert. denied*, 389 U.S. 1050 (1967), *reh. denied*, 393 U.S. 903 (1968); *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 90 S.Ct. 347 (1969), *reh. denied*, 397 U.S. 929 (1970).

[2] 33 U.S.C. § 903(a), 86 Stat. 1251 (1972).

utilized by Employer for the actual loading or unloading of vessels; rather, it is used for storage of commodities and for stripping, or stuffing, i.e., loading or unloading, of containers. The Claimant sustained his injury at the 19th Street Pier, while checking cargo being stripped from a container, which, sometime previously, had been off-loaded from a vessel at another of Employer's facilities and brought to the 21st Pier facility for stripping.[3]

The legislative history of the Amendment specifically states the Congressional intent to expand coverage beyond the water's edge.[4] The Amendment incorporates this intent, expressly extending coverage to include an adjoining pier, or other adjoining area customarily used by an employer for, *inter alia*, loading or unloading vessels. It has been held that, ". . . until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment such cargo is in maritime commerce . . ."[5] Clearly the container which contains the cargo must, until stripped, also be deemed to be in maritime commerce. Moreover, a construction of the words loading or unloading a vessel, so as to restrict coverage only to those individuals actually engaged in such activity, is unduly restrictive and has been rejected.[6] Such rationale is applicable here and is consistent with cases holding that stuffing or stripping of containers is an in-

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[3] The fact that this work was being done by Employer, under contract, for American Export Lines, does not affect the maritime nature of the work accomplished in this area.

[4] S. Rep. No. 92-1125, 92nd Cong., 2d Sess., 13, *Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972* (1972), at 64; 75.

[5] *Avvento* v. *Hellenic Lines, Ltd., et al.*, BRB No. 74-153 (November 12, 1974) at 4.

[6] Cf. *Coppolino* v. *International Terminal Operating Co., Inc.*, BRB No. 74-136 (December 2, 1974) at 3; *Adkins* v. *I.T.O. Corporation of Baltimore*, BRB No. 74-123 (November 29, 1974).

tegral and essential step in the overall loading or unloading process.[7] I conclude, therefore, that the area in which Claimant sustained his injury is included within the expanded situs requirements of the Act. Accordingly, I find that from the standpoint of situs, this claim comes within the provisions of the Act.

However, employees not engaged in maritime employment as defined by the Act, are not covered just because they sustain an injury in an area to which the Act's jurisdiction has been extended;[8] therefore, if Claimant is to prevail, he must also meet the status tests now imposed by the Act: he must, at the time of injury have been an "employee", in the employment of an "employer", as those terms are defined by the Act. The Employer herein conceded that it is an "employer", as that term is defined by the Act;[9] therefore, it is taken as established that the Employer is an "employer" within the meaning of the Act.[10] The Act contains the following definition of the term, "employee":

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker . . . .[11]

At the time he sustained his injury, the Claimant was performing his duties as a checker, on the 19th Street Pier, assisting in the stripping of a container and the segregation of its cargo into separate drafts. Although

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[7] E.g. *Powell* v. *Cargill, Inc.*, 74-LHCA-172 (October 8, 1974), Judge Miller; *Stockman* v. *John T. Clark & Son of Boston, Inc., et al.*, 74-LHCA-219 (November 25, 1974), Judge Oliver.

[8] *Legislative History, supra*, note 4 at 75.

[9] TR 80-81.

[10] 33 U.S.C. § 902(4), 86 Stat. 1251 (1972).

[11] 33 U.S.C. § 902(3), 86 Stat. 1251 (1972).

a precise date was not determined, it is clear that the container from which the cargo Claimant was checking was being stripped, was sometime previously off-loaded from a vessel at another of the Employer's facilities and subsequently transported by an independent trucking firm to the 19th Street Pier for stripping and further trans-shipment. The Claimant, while in the process of checking individual drafts formed from cargo stripped from this container slipped on some ice, fell and sustained the injury for which he seeks compensation in this proceeding.

The process of unloading a vessel cannot reasonably be held to have terminated at the point where the cargo and its container hits the pier.[12] Adopting such view, the Benefits Review Board has held that cargo is deemed to be in maritime commerce until it has been delivered for further trans-shipment and that all employees engaged in its movement to that point are engaged in maritime employment.[13] The fact that this particular container had been off loaded from a vessel at another of Employer's facilities and thereafter trucked to the 19th Street Pier for stripping, i.e., unloading, does not adversely affect Claimant's status. The container was not being trucked for further trans-shipment; rather, it was merely being transported for purposes of unloading. Herein the container had to be stripped and the cargo separated into individual drafts for further trans-shipment; hence both the container and the cargo it contained, must be held to have been moving in the stream of maritime commerce. Until the contents had been stripped, the unloading process had not been completed.[14] I conclude, therefore, that

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[12] Cf. *Di Somma* v. *John W. McGrath Corp.*, 74-LHCA-176, Judge Miller.

[13] *Avvento, supra*, note 5 at 4.

[14] Cf. *Crampton* v. *Cargill, Inc.*, 74-LHCA-215, Judge Smith; *Stockman* v. *John T. Clark & Son of B ston, Inc., et al.*, 74-LHCA-219, Judge Oliver.

the stripping of this container and the checking of the drafts was an integral, essential and sequential part of the overall process of unloading cargo from a vessel. Moreover, the Claimant, while engaged in checking this cargo, was performing a function to which Congress expressly extended the coverage of the amended Act.[15]

Upon consideration of the record in its entirety and the applicable precedents, I hold that the Claimant at the time of his injury, was an "employee" of the Employer, as that term is defined by the Act. Accordingly, as the Claimant meets both the situs and the status requirements of the Act, he is entitled to receive compensation benefits pursuant to the Act.

The record indicates that the Claimant has received compensation benefits under the New York State Workmen's Compensation Statute. Acceptance of such benefits under a state act does not constitute an election which precludes recovery under the Federal Act.[16] The Employer, however, is entitled to credit for the amounts paid thereunder against sums due pursuant to the Federal Act.[17]

Counsel for Claimant has filed an application seeking an award of attorney's fees in the sum of $2,800.00. Upon consideration of the application, my observations during trial and the compensation results obtained, I find that an attorney's fee in the amount of $1,200.00 would be a reasonable attorney's fee.[18] An attorney's fee for said amount is approved and assessed against the Employer.[19]

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[15] *Legislative History, supra*, note 4 at 75.

[16] *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, 131, 82 S. Ct. 1196, 1206 (1962).

[17] *Western Boat Bldg. Co.* v. *O'Leary*, 198 F.2d 409, 411, 412 (9th Cir. 1952).

[18] *Avvento, supra*, note 5 at 5.

[19] 33 U.S.C. § 928(a).

I hold that the disbursements which Counsel for Claimant seeks to recover are not recoverable costs within the meaning of the Act; therefore, their recovery and assessment against the Employer is denied.[20]

Findings of Fact and Conclusions of Law

Upon consideration of the record in its entirety, the Stipulations of Counsel, and from observation of the witnesses and their demeanor, I make the following specific Findings of Fact and Conclusions of Law:

1. The Claimant has made a claim for compensation benefits under the Act for injuries he sustained on January 8, 1974, while in the employ of the Employer.

2. The Claimant's injury arose out of and in the course of his employment.

3. The Employer is an "employer" within the meaning of the Act.

4. There was timely notice, both of the injury and of the claim.

5. The area in which Claimant sustained his injury is an area to which coverage has been extended by the Act.

6. At the time of injury, the Claimant was an "employee" of the Employer within the meaning of the Act; therefore, Claimant is entitled to receive applicable compensation benefits under the Act, as the Parties are subject to the Act.

7. The Claimant was, as a result of his injury, temporarily totally disabled from January 9, 1974, to February 1, 1974, for which period, less two (2) days worked he is entitled to the benefits provided by the Act. 33 U.S.C. § 908(b).

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[20] 33 U.S.C. § 928(d); *Fox* v. *Pacific Ship Repair, Inc., et al.*, 75-LHCA-53, at 10-11; *Spencer* v. *Stockton Stevedore & Warehouse, et al.*, 75-LHCA-52, at 9-10.

8. The Claimant is entitled to have the Employer pay for, or reimburse him for the reasonable cost of such necessary medical treatment and care as the nature of his injury may, or may have required. 33 U.S.C. § 907 (a).

9. The Claimant's average weekly wages, at time of injury, were $257.69, for a compensation rate of $171.79 per week.

10. The Employer has paid to the Claimant, as compensation benefits pursuant to state compensation law the sum of $285.00, and Employer is entitled to receive credit herein for such sum against amounts due under the Act.

11. The Claimant is entitled to have reasonable attorney's fees assessed against the Employer; however, other disbursements are not recoverable costs, assessable against the Employer.

Order

1. The Employer shall pay to the Claimant compensation for temporary total disability, at the rate of $171.79 per week, for the period from January 9, 1974, to February 1, 1974, less two (2) days worked.

2. Interest on accrued payments due Claimant shall be paid at the rate of six (6) percent per annum, computed from the date each such payment was due, and the total amount of such payments, as are now due and owing, shall be paid forthwith, in a lump sum, to the Claimant. *Humble Oil and Refining Co.* v. *Taliaferro*, BRB No. 107-73 (June 1, 1973).

3. The Employer shall be allowed credit in the sum of $285.00, against such amounts as are due hereunder, which sum is the amount previously paid to the Claimant pursuant to the compensation statute of the State of New York.

4. The Employer shall pay for, or reimburse the Claimant for the reasonable cost of such necessary medical care and treatment as the nature of Claimant's injury has or may require.

5. A legal fee in the amount of $1,200.00, for legal services rendered to the Claimant is approved in favor of Angelo C. Gucciardo, Esq., which fee shall be paid directly to him by the Employer.

/s/ Patrick G. Geraghty
PATRICK G. GERAGHTY
Administrative Law Judge

Dated: March 3, 1975
Washington, D. C.

APPENDIX D

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D.C. 20210

Case No. 75-LHCA-157

(Formerly No. 2-31357)

In the Matter of

CARMELO BLUNDO,
Claimant

v.

INTERNATIONAL TERMINAL OPERATING CO., INC.
Employer (Self-Insured)

Order Amending Previously Issued Decision and Order

On March 3, 1975, this Administrative Law Judge issued his Decision and Order in this proceeding, awarding compensation benefits to the Claimant. Therein, the Employer was ordered, *inter alia*, to pay to the Claimant compensation for temporary total disability, at the rate of $171.79 per week, for the period from January 9, 1974 to February 1, 1974, less two (2) days worked.

Counsel for Claimant has filed a Motion to Modify the Decision and Order of March 3, 1975, on the grounds that the period of temporary total disability set forth in paragraph 1 of said Order is incorrect. Counsel points out that, although under the New York State compensation statute a claim was made and paid for temporary total disability from January 9, 1974 to February 1, 1974, the Parties herein stipulated and agreed that, for purposes of Claimant's claim pursuant to the Federal

Act, Claimant's period of temporary total disability was January 9, 1974 to April 15, 1974, inclusive, less two (2) days worked (TR 6, 11, 9-18; *Joint Exhs.* 1, 2). Counsel for the Employer has not filed a Reply in opposition to this Motion for Modification.

WHEREFORE, as upon consideration of the foregoing promises it appears that the Decision and Order of March 3, 1975, should be modified to conform to the stipulations and agreements of the Parties, it is therefore,

ORDERED, that the Decision and Order of March 3, 1975, be, and the same hereby is, modified as follows:

A. Paragraph 7, *Findings of Fact and Conclusions of Law*:

> 7. The Claimant was, as a result of his injury, temporarily totally disabled from January 9, 1974, to April 15, 1974, for which period, less two (2) days worked, he is entitled to the benefits provided by the Act. 33 U.S.C. § 908(b).

B. Paragraph 1, *ORDER*:

> 1. The Employer shall pay to the Claimant compensation for temporary total disability, at the rate of $171.79 per week, for the period from January 9, 1974, to April 15, 1974, inclusive, less two (2) days worked.

and further, that in all other respects the Decision and Order of March 3, 1975, is affirmed and adopted.

/s/ Patrick G. Geraghty
PATRICK G. GERAGHTY
Administrative Law Judge

Dated: April 18, 1975
Washington, D.C.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1360

JOHN A. STOCKMAN,
Claimant, Respondent,

v.

JOHN T. CLARK & SON OF BOSTON, INC.,

and

AMERICAN MUTUAL LIABILITY INC. CO.,
Employer/Carrier, Petitioners,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party in Interest.

ON PETITION FROM THE
BENEFITS REVIEW BOARD

Before COFFIN, *Chief Judge,*
McENTEE and CAMPBELL, *Circuit Judges.*

George O. Driscoll for appellants.

Joseph P. Flannery, with whom *Joseph G. Abromovitz* and *Kaplan, Latti and Flannery* were on brief, for John A. Stockman, appellee.

Linda L. Carroll, Attorney, United States Department of Labor, with whom *William J. Kilberg*, Solicitor of Labor, and *Laurie M. Streeter*, Associate Solicitor, were on brief, for Director, Office of Workers' Compensation Programs, appellee.

July 27, 1976

CAMPBELL, *Circuit Judge*. This petition for review, brought by an employer and its compensation carrier, raises a difficult question of interpreting the 1972 amendments to the Longshoremen's and Harborworkers' Compensation Act (the Act). 33 U.S.C. § 901 et seq.

Working on the Boston waterfront for his employer, John T. Clark & Son of Boston, Inc. (Clark), John A. Stockman sustained an inguinal hernia on October 1, 1973, while removing the contents of a container [1] which had previously been off-loaded from a vessel. Clark and its insurer, acknowledging liability under Massachusetts workmen's compensation law, furnished Stockman with medical care and paid him compensation at the maximum weekly state rate of $80 during the seven weeks that he was disabled. Stockman claimed, however, that he was entitled to be compensated at the much higher rate provided in the Longshoremen's and Harborworkers' Compensation Act. Total benefits payable under the Act for the period of disability in question exceeded those payable under Massachusetts law by more than $700. When Clark and its carrier refused to acknowledge that

[1] Containers are rectangular metal structures used to transport cargo. After being taken off the vessel by crane, they are provided with a chassis and wheels and converted into large box trailers capable of being trailed on the highways by tractors.

Stockman was covered by the Act, the matter was referred to an Administrative Law Judge, § 919, who ruled after hearing that Stockman was covered. Clark and the carrier appealed from this ruling to the Benefits Review Board (the Board), § 921(b) (1976 Supp.), which affirmed the decision of the Administrative Law Judge. Thereafter they brought this petition, § 921(c) (1976 Supp.).

I

The difficulty in determining Stockman's coverage arises from the essential ambiguity of the 1972 amendments insofar as they describe, or fail to describe, the employees for whom coverage is afforded. As was developed at the hearing before the Administrative Law Judge, Stockman was a regular employee of Clark who had for three years prior to his injury worked at Berth 5 of the Boston Army Base, an area adjacent to Boston Harbor. Clark is both a stevedore, i.e. a firm engaging directly in the unloading of vessels, and a terminal operator.[2] Clark's Boston Army Base facility was used

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[2] Mr. Kelley, Clark's Treasurer, gave his view of the difference between a stevedoring and a terminal operation as follows:

> "The distinction in the point of rest. Cargo that is—whether it be containers or freight bulk cargo—when the longshore gangs are working the cargo and discharging it and they bring that cargo to a point of rest, either in a shed or outside a shed, and they terminate, they finish their job, that's the end of the stevedoring function, and from that point on the terminal operation function takes over, it's somewhat similar to a warehousing operation."

Under Kelley's theory, once the stevedoring function ended, the work became freight handling.

Stockman, on the other hand, insisted,

> "Cargo is merchandise that's carried in a vessel and I maintain that cargo does not become freight until after it's grounded on the dock [viz. trucking dock] and the truck driver comes in and touches it. ILA [the International Longshoremen's Association, of which Stockman was a member] helps handle it all the way until it's actually taken out of that container. The container in my opinion is more or less part of the ship."

both to unload vessels that berthed there, and to store and warehouse cargo which had either been unloaded there or been brought in containers from vessels berthed elsewhere.

At the time Stockman sustained a hernia, he was at Berth 5 of the Boston Army Base "stripping" (removing cargo from) a container. The container had been discharged from a vessel that had berthed during the previous three days at Berth 17, Castle Island, a facility located approximately two miles by land or 700-800 feet across water from the Boston Army Base. Under the terms of its contract with Sea-Land Corporation, the owner of the container, Clark was "to unload vessels as they come into port [and] discharge the containers." However, Sea-Land's container vessels did not dock at the Army Base since they require a special crane and berth not available there. Sea-Land's vessels berthed instead at Castle Island, where the containers were put ashore; chassis with wheels were provided; and those containers having full loads for a particular consignee were hitched to a truck-tractor and hauled directly to their ultimate destinations, to be unloaded by the consignee. Some containers would not, however, contain a full load for one consignee and it was up to Clark to strip them, separate their contents by orders, and hold the goods for pickup by consignees. In such cases, as there were no facilities at Castle Island either for stripping or for "stuffing" (placing cargo in) containers, the containers would first be hauled by an independent trucking firm, engaged by Sea-Land, to Clark's Boston Army Base facility. There Clark would remove the contents from the containers, place them on pallets, and hold them for pick-up by truckers for the various consignees. The container Stockman was stripping had been hauled overland from Castle Island by a truck furnished by the

Boston-Taunton Transportation Company under contract with Sea-Land; and Stockman was removing the contents and placing them on pallets at Berth 5 of the Boston Army Base when he sustained his injury.

At the hearing various descriptions were offered of Stockman's job-title. Mr. Kelley, Clark's treasurer, called Stockman a "freight handler" as "that's the insurance code classification that he would fall under". Stockman himself testified that he was classified as a crane operator and for casual work on the dock. He said he drove chisels, stuffed and stripped containers, and shifted cargo. The parties stipulated that Stockman was "employed as a longshoreman with collateral ratings as a cooper and extra dock laborer". Stockman was a member of the International Longshoremen's Association, AFL-CIO, and Clark a member of the Boston Shipping Association, Inc. Under an agreement between the ILA and the Shipping Association, containers within 50 miles of a port (other than ones handled by the "beneficial owners" of the cargo) had to be stuffed and stripped by ILA longshore labor working on a "waterfront facility, pier or dock."

The relevant provisions of the Act against which Stockman's claim of coverage must be measured are §§ 902 (3), 902(4) and 903(a), all as amended in 1972. Section 903(a), entitled "coverage", is sometimes referred to as the "situs" requirement, and provides as follows:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . ."

Section 902(3), sometimes referred to as the principal "status" requirement, defines and limits the term "employee" to,

> "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker [exclusive of a master or member of a crew of any vessel, or any person engaged to load, unload or repair any small vessel under eighteen tons net]."

There is also the following definition of "employer" in § 902(4),

> "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

The Administrative Law Judge, whose reasoning the Benefits Review Board affirmed, ruled that Stockman's injury occurred at a location within the situs requirements of § 903(a). He found that Stockman was employed to unload containers at Berth 5 of the Boston Army Base; that Berth 5 adjoins navigable waters "and is used for the general cargo operations of loading and unloading vessels, although the stripping of containers received from Berth 17, Castle Island is considered a terminal operation"; and that Stockman's injury met the Act's situs requirements since wharf and terminal areas are specifically mentioned in § 903(a). The Administrative Law Judge attached no weight to the fact that the container had not been discharged from a vessel at Berth 5 of the Boston Army Base but had been driven two miles overland from Castle Island, Berth 5 being,

in any event, a "terminal adjoining navigable waters". And even were this not so, Clark's Army Base facilities were an "other adjoining area customarily used by an employer in . . . unloading . . . a vessel," since any and all Sea-Land containers that were to be stripped were customarily trucked there from Castle Island as an integral step in the process of unloading a vessel.

The Administrative Law Judge went on to rule that Clark, being both a stevedore and terminal operator, was an "employer" within § 902(4) since it employed longshoremen to perform some of this work.

Finally, the Judge held that Stockman met the status definition of "employee" under § 902(3), being engaged in "maritime employment". The Judge thought that little attention should be paid labels such as longshoreman or "freight handler". Stating that it was not the label given but "the nature of the work being performed" that was determinative, the Judge held that "[u]ntil the contents were removed from the containers the unloading procedure had not been completely executed. The unloading of this container was an integral and sequential part of the process of unloading cargo from a vessel. *Cf. Powell* v. *Cargill, Inc.*, [74-LHCA-172 (October 8, 1974)]; *Richardson* v. *Great Lakes Storage & Contracting Co., et al.*, 74-LHCA-223 (October 18, 1974)". The Judge continued,

> "The fact that the containers had to be trucked two miles across the channel for unloading is not significant. The containers, at this point, were not being picked up from storage for further transshipment, but were merely being transported for unloading. If the containers had been stripped by longshoremen at the Castle Island facility where they arrived, this work activity would, in my view, have been clearly covered by the Act. Claimant should not be denied the protection and coverage

> of the Act merely because circumstances required his Employer to have longshoremen perform the stripping function at another waterfront facility two miles away. *Cf. Crampton* v. *Cargill, Incorporated*, 74-LHCA-215 . . . . Such a finding would not be within the "humanitarian goals" of the Act.
>
> . . . I hold that the Claimant was injured in a shoreside area while he and his Employer were engaged in maritime employment within the coverage of the Act."

In affirming, the Benefits Review Board held it to be "now well settled" that a claimant like Stockman was within the jurisdictional reach of the Act. It said that stripping and stuffing containers were "maritime employment", and that the temporary resting of containers for three days prior to stripping was immaterial to the maritime nature of the employment.

III

While the Board's determination is consistent with its other recent rulings finding coverage for most handlers of ship's cargo at piers and waterfront terminals, whatever their precise function, judicial decisions to date construing the 1972 amendments reflect a sharp difference of opinion over the reach of the Act. A divided panel of the fourth circuit has ruled that terminal employees, as distinct from those immediately engaged in taking cargo from (or putting it on) a vessel lying at its berth, are not covered even when injured in an area more immediately adjacent to the ship's berth than was the Boston Army Base here. Terminal employees are not, in its view, engaged in maritime employment within the meaning of § 902(3). *I.T.O. Corp.* v. *Benefits Review Board*, 529 F.2d 1080 (1975), reargued en banc May 4, 1976. The court felt that while the 1972 amendments enlarged the "situs" so as to provide compensation for injuries oc-

curring at designated shoreside facilities as well as on shipboard, they narrowed the "status" requirement so as to limit coverage to only maritime workers engaged most directly in traditional employment, e.g., in cases of longshoremen, those immediately engaged, at the time of injury, in the direct loading or unloading of a vessel itself. To give effect to its interpretation of the amendments, the fourth circuit read into the Act the notion of "point of rest", a point shoreward of which the handling of cargo would cease to be covered by the Act.

A divided second circuit panel has rejected altogether the fourth circuit's point of rest approach. *Pittston Stevedoring Corp.* v. *Dellaventura*, Nos. 76-4042,-4009,-4043-4249 (July 1, 1976) (Friendly, J.) In *Pittston*, one of the employees was a "checker" who, like Stockman, was stripping a container of goods destined to different consignees at a waterfront area remote from where the ship had been unloaded. The court held that stripping was the "functional equivalent" of sorting cargo discharged from a ship, and was covered by the Act.

From the present judicial melange[3] can be gathered the truth of Judge Friendly's remark:

> "Given the importance of the question, the number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said." Slip op. at 4683.

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[3] The ninth circuit has also recently interpreted the coverage provisions of the Act, though on facts so different (longshoremen were not involved) as to make the decision of little relevance here. *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3645 (U.S. May 6, 1976) (No. 75-1620). The court emphasized that for an employee to be eligible, his own work and employment must have a "realistically significant relationship" to traditional maritime activity.

IV

Before expressing our views on the merits, we turn to several preliminaries. First, we consider whether in deciding the scope and coverage of the Act, we should give weight to the presumption stated in § 920 that "the claim comes within the provisions of this chapter". We think not. This provision relieves an injured employee from a perhaps bothersome burden in cases where coverage is uncontested, and it may well denote a policy favoring coverage in close cases; but we do not think it bears on the decision before us calling for a general construction of "whether Congress placed the line at the 'point of rest' or much further landward". *Pittston*, *supra*, at 4703-04. This basic interpretative decision must precede any application of the presumption.

Second, we do not see the decision before us as one where we owe a special deference to the decision of the Board (and of the Administrative Law Judge, whose views were seemingly carried forward in the Board's shorter opinion). Judge Craven, dissenting in *I.T.O.*, *supra*, 529 F.2d at 1091, quoted the Supreme Court in *NLRB* v. *Boeing*, 412 U.S. 67, 75 (1973), to the effect that "[a] consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts." Under § 939 the Secretary is directed to administer the Act and to make necessary rules and regulations, and under § 921 (1976 Supp.) the Benefits Review Board, with members appointed by the Secretary, is charged with determining appeals subject to review by courts of appeal. Judge Craven concluded that the Board, in "an unbroken line of decisions", has consistently and reasonably interpreted the coverage provisions found in the 1972 amendments, and that this interpretation should be accorded " 'great weight' " by a court. 529 F.2d at 1092.

But while the Board's views are obviously to be regarded with interest and respect, we do not think we are justified in a case of this character in subordinating our own judgment. Professor Davis' discussion is particularly helpful in considering how much deference a court ought to accord to agency determinations. 4 Davis, Administrative Law Treatise § 30.09 et seq. He suggests three criteria: (1) the relative expertise of agency and court; (2) whether there is express statutory delegation of a question to the agency; and (3) whether the problem involves general propositions or the application of such propositions to specific facts.

The first criterion, the expertise of the court relative to that of the agency, depends in turn upon the nature of the question to be decided. Here the Secretary of Labor and the Board may know more about the technical aspects of work on the waterfront, the needs of workers, and the labor management issues intertwined with the Act, but they have no greater expertise than a court in construing statutes, judicial decisions and legislative history, and the latter is the paramount task before us.

The second criterion is the extent to which Congress may have expressly entrusted the question to the agency rather than to a court. Here Congress entrusted to the Secretary the daily administration of the Act, but created an independent Benefits Review Board to determine appeals "raising a substantial question of law or fact" from initial orders, § 921(b)(3) (1976 Supp.), with ultimate review in the courts of appeal. From this structure, we can doubtless infer an intention to grant to the Board, subject to court review, a substantial oversight of questions of law and policy affecting the distribution of benefits in a particular case. Still, we agree with Judge Friendly that the Board is less a policy-making and more an "umpiring" body than is true of agencies such as the National Labor Relations Board, *see Pittston*, *supra*, at

4706, while the Secretary's own discretion, being subordinate in the legal area to that of the Board, is even more limited. In sum, while on occasion we may well expect to defer to the Secretary or the Board in particular applications, we see neither the Board nor the Secretary as having been commissioned to settle the sort of question, involving the general construction of an act of Congress, encountered here.

As Davis points out in presenting his third and final criterion, a distinction exists "between enunciation of general propositions or methods of approach and the mere application of such propositions or methods to unique facts." § 30.11, at 253. A question such as whether the Act is to be interpreted to cover all workers in the loading or unloading process, defined broadly, or only those immediately associated with taking the cargo on or off a certain vessel, is the kind of "general proposition" on which courts must provide their own judgment. *Id.* at 254.

This is not to overlook our duty to accept the Board's factual findings when supported by substantial evidence. *Pittston*, *supra*, at 4704. Although not expressly stated in the Act, *compare* § 921(b)(3) (requiring the Board to accept the supported findings of the Administrative Law Judge), we readily assume the existence of such a duty. Still the material facts are not in dispute, and as the focus is upon the meaning of the statute, the judgment must be our own, not the Board's.

V

Proceeding, then, to our own assessment of Stockman's status under the current Act, it is useful first to consider the prior law and the changes brought about by the 1972 amendments. Compensation was previously payable only if disability or death resulted from injury occurring upon "navigable waters" including "any dry

dock". Recovery was expressly forbidden if recovery could be validly provided under state workmen's compensation laws. The Supreme Court accordingly interpreted the earlier Act to reimburse only injuries seaward of the pier, e.g. on shipboard or other like structure within the narrow confines of the admiralty tort jurisdiction. *Nacirema Co.* v. *Johnson*, 396 U.S. 212 (1969) (no coverage under the Act for injuries to longshoremen occurring on a pier affixed to land); *cf. Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971). Thus before the amendments, the Act was regarded as a rather limited supplement to state workmen's compensation laws,[4] designed not to supersede or improve upon those laws but to fill a gap which the states were without jurisdiction to fill. *Cf. Washington* v. *Dawson & Co.*, 264 U.S. 219 (1924); *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922); *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

An anomaly was then created by this narrow reliance on location or "situs" to delineate the limits of coverage—the same longshoreman who could recover if injured while working on board a ship could not recover if injured a few feet away from the ship on a pier. In *Nacirema* the Court recognized and discussed this seeming

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[4] During the pre-1972 period, longshoremen and harbor-workers injured on shipboard (or on land by a ship's appurtenance) could sue the vessel for unseaworthiness as well as for negligence, achieving, in some instances, recoveries far beyond anything available under the Act. *Guttierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963); *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946). The 1972 amendments eliminated the unseaworthiness remedy for longshoremen and harborworkers while greatly increasing the benefits payable under the Act and by enlarging its scope to include injuries on piers and terminals adjoining navigable waters. The amendments also removed the express exclusion for injuries which would be covered under state workmen's compensation laws.

unfairness but felt there was little to be done.[5] It discussed the matter in terms of "situs" and "status", terms used by the Administrative Law Judge in the present case (Stockman's injury was said to have occurred within the "situs" provisions of the Act and his employment to meet the "status" provisions). The Court said that it was being urged to extend coverage on the basis of the "status" of longshoremen employed in performing a maritime contract, 396 U.S. at 215, but declined to do so, reading the Act as determining coverage exclusively by the "situs" of the injury. The Court went on to state,

> "Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts. 7 [7. The admiralty jurisdiction in tort was traditionally 'bounded by locality,' encompassing all torts that took place on navigable waters. By contrast, admiralty contract jurisdiction 'extends over all contracts, (wheresoever they may be made or executed . . .) which relate to the navigation, business or commerce of the sea.' Since a workmen's compensation act combines elements of both tort and contract, Congress need not have tested coverage by locality alone. As the text indicates, however, the history of the Act shows that Congress did indeed do just that.] But the language of the Act is to the contrary and the background of the statute leaves little doubt that Congress' concern in pro-

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[5] The Court said in *Nacirema*,

> "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension [of Admiralty Jurisdiction] Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act."

396 U.S. at 223. The Court concluded that while Congress could draw whatever line it chose, "the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court." 396 U.S. at 224.

viding compensation was a narrower one." [Citations omitted.]

396 U.S. at 215-16.

Against this background, Congress enacted the 1972 amendments. With respect to "situs", it clearly shut the door on any continued interpretation of the Act's boundaries as being coextensive with the boundaries of admiralty tort jurisdiction. While disability or death must still result from an injury occurring upon the "navigable waters of the United States", these are now defined to include shoreside structures such as a pier, terminal, or "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel". Such facilities, not ordinarily considered to be "navigable waters", have always been outside the exclusive federal admiralty tort jurisdiction. They are areas where the authority of the United States to enact compensation laws for maritime workers overlaps state authority to enact workmen's compensation laws.[6]

Doubtless in part because of this overlap, Congress did not limit its changes in 1972 to a widening of the "situs" requirement. For the first time, it undertook to define the class of persons covered by inserting an inclusive definition of "employee", § 902(3). Thus while "status", as distinct from "situs", was formerly of minor importance, *cf. Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1953), it has become a matter of considerable significance. Only an "employee" is covered, defined as "any person engaged in maritime employment, including any longshoreman or other person engaged in

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[6] As indicated in the text, the Supreme Court went to some length in *Nacirema* to indicate that Congress had power to extend federal workmen's compensation laws for those in maritime employment shoreward, into areas outside the exclusive admiralty tort jurisdiction.

longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." § 902(3).

VI

In the present case, we hold that the situs requirement of § 903(a) was plainly met, in spite of the distance separating Berth 5 of the Boston Army Base from the Sea-Land berth at Castle Island. Appellants' only substantial argument is their challenge to Stockman's status as a member of the covered class under § 902(3).[7]

On the question of situs, the simple fact is that the amended Act defines navigable waters to include "any adjoining pier, wharf, . . . terminal, . . . or other adjoining area customarily used by an employer in loading [or] unloading . . . a vessel". § 903(a). "Adjoining" can only refer to navigable waters; and Stockman was, as even Clark concedes, working at a terminal which adjoined navigable waters. To be sure, the final reference to "other adjoining area customarily used by an employer in loading [or] unloading . . . a vessel", as well as other parts of the statute, suggests that Congress had in mind a terminal associated with the shipboard movement of marine cargoes. But we do not think Congress meant necessarily to limit "adjoining" to only those areas directly adjoining the berth of the specific vessel being unloaded. The terminal here in question is at a location which is customarily used in loading and unloading ves-

[7] Stockman contends that since appellants did not initially shape their argument before us in terms of status, but rather urged that the Army Base facility not being contiguous with Sea-Land's Castle Island berth, was outside the situs provision, we should decline to consider the issue of status. But status was considered both by the Administrative Law Judge and by the Board, and we think no purpose is served in bifurcating the issues at this stage, the ultimate question being one of construing the statute as a whole. In a reply brief, appellants have belatedly briefed the status issue.

sels. Some vessels do, in fact, lie there for loading and unloading. Moreover, the area is several hundred yards directly across open water from the berth of Sea-Land's container vessels and is generally part of the same Boston waterfront area. We are not faced with the stripping of a container at an inland freight depot having only some incidental connection with navigable waters. We therefore conclude, from all these factors, that the situs requirement of § 903(a) has been met.

We thus return to what we regard as the only issue on which appellants could prevail, whether Stockman was engaged in "maritime employment" within § 902(3). We agree generally with Judge Winter, writing for the majority in *I.T.O.*, *supra*, 529 F.2d at 1084-85, that the terms "maritime employment", "longshoreman" and "longshoring operations" in § 902(3) do not have any such settled meaning that we should decide the case without resort to the legislative history.

We start with the obvious fact that the Act and the relevant House and Senate Reports speak repeatedly of longshoremen, indicating, if it could be doubted, that they are a prime class of employee intended to be benefited. Stockman, the parties stipulated, is a "longshoreman"; he belongs to the ILA; and he works at a waterfront terminal for a stevedore and terminal operator whose chief activity appears to be the handling of shipborne cargo. Clark was under contract to "unload [Sea-Land] vessels as they come into port [and] discharge the containers", and it was in connection with this latter operation that Stockman was injured.

Still, as the second circuit points out, "it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoremen-like positions as clerks or guards." *Pittston*, *supra*, at

4712. To be sure, stuffing and stripping containers is much closer to conventional longshore activity than clerking or guarding, though the analogy is not total because the containers, once landed, are transformed into trailers. The contract between the ILA and the Boston Shipping Association, in evidence here, reflects a negotiated undertaking to use only longshore labor to strip and stuff containers, and to do so exclusively at waterfront facilities. Doubtless the union insisted upon such a provision because otherwise containers could be driven to most any location and discharged there by non-waterfront labor. And its insistence upon the use of longshore labor was not totally arbitrary. Containerization greatly simplifies and speeds up the actual loading and unloading of the ship itself, cutting down the workforce needed for those operations. Much of the loading and unloading that used to take place on or alongside the ship is presumably now reflected in the stuffing and stripping of containers. From the longshoremen's point of view this is "traditional" work, and, as further discussed below, there is much to support their position.

But while such considerations indicate that stuffing and stripping—unlike clerking and guarding—cannot be dismissed as beyond the reasonable purview of longshore work, they do not tell us what coverage Congress had in mind. Before proceeding further, we set forth the relevant passages from the House Report:

> "Extension of Coverage to Shoreside Areas
>
> "The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury

depending on which side of the water's edge and in which State the accident occurs.

"To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. . . .

. . .

"It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

"The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters."

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess.

Two other courts of appeals have already interpreted the Act in light of these passages, coming to quite different conclusions. Judge Winter, writing in *I.T.O.* for the fourth circuit, read the committee reports as limiting coverage to those engaged in the immediate loading and

unloading of ships, particularly in view of the stated intent of the committees to achieve uniform compensation of employees who would otherwise be covered for part of their activity. The fourth circuit then went on to limit coverage to injuries occurring between the first dockside holding area and the ship.[8]

The second circuit, to the contrary, emphasizing the committee's concern for a "uniform compensation system", read the legislative reports as manifesting an intention to cover, rather more broadly, those taking part at the designated sites in the complex process of loading or unloading a vessel, though it rejected (as do we) one commentary's shotgun approach that "all employment related injuries which occur within the Act's territorial limits" be covered. G. Gilmore & C. Black, Law of Admiralty § 6-51, at 430 (3d ed. 1975), *quoted in Pitston, supra*, at 4719-20 & n. 27. In refusing to follow the fourth circuit, the second circuit made much of the fact that "employee" under the Act includes "any longshoreman" as well as "other person engaged in longshoring operations". Thus "[a] 'longshoreman' may . . . be covered at some times even when he is not engaged in traditional longshoring activity." *Id.* at 4712. We agree with Judge Friendly that, whatever the workers covered, a claimant's status need not depend wholly on the job being performed at the very moment of injury.

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[8] Judge Winter acknowledged that the point of rest rule so formulated might result in coverage for a longshoreman working exclusively on shore between the point of rest and the ship. While such a shorebound worker would never have been covered under the old Act, Judge Winter felt that coverage could be inferred from the committee language as a whole and the liberality of construction to be afforded remedial legislation of this type. *I.T.O., supra*, at 1088. Inexplicably, Judge Winter did not discuss the opposite side of the coin: the failure of a point of rest rule to cover a longshoreman who works part of the time on vessels but whose injury occurs while he is working at a covered situs shoreward of the point of rest.

It seems clear that, however construed, the House Committee Report, and the similar Senate Committee Report, Sen. Rep. No. 92-1125, 92d Cong. 2d Sess., go only part way towards clarifying the application of the 1972 amendments in the present situation. None of the mentioned examples refer to someone like Stockman. Stockman is plainly not an employee "whose responsibility is only to pick up stored cargo for further transshipment"; nor do we think that hauling the trailer from the Sea-Land berth to the Boston Army Base for stripping can be viewed as picking up stored cargo for transshipment. Indeed, Congress has seemingly gone out of its way to avoid taking any express stance on the status of those engaged in stuffing and stripping containers as part of the loading and unloading process just as it is silent on the status of other terminal employees engaged in moving, storing and culling cargo on the pier. Still, while scarcely explicit, the legislative reports do convey several relevant messages:

1. The amendments are to be construed to achieve a "uniform compensation system" which does not depend on the "fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water".

2. The amendments are to afford coverage to employees, or possibly classes of employees, who would otherwise have been covered for part of their activity by the the earlier Act.

3. One of the reasons for affording coverage on land is that "with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore".

Attempting to reconcile these notions, we are not satisfied with the "point of rest" theory advanced by the fourth circuit. To be sure, the committee reports state that coverage is for employees who formerly would have

been covered for part of their activity, in other words those whose duties require their part-time presence on shipboard (as there would be no coverage under the old Act for purely landbased workers). But we see nothing to suggest that Congress meant, for example, to exclude from benefits a steadily employed longshoreman whose duties periodically took him aboard ship but who, at the time of injury, was engaged in moving terminal cargo shoreward of the point of rest. The fourth circuit's view would create, in effect, a further and more narrow situs requirement than that in the Act. *See* Judge Craven's dissent in *I.T.O. supra*, at 1096-97. Whether the status of at least a steady employee is that of a "maritime" worker, including "longshoreman", seems to us to require looking at the nature of his regularly assigned duties as a whole.

We would further comment that the fourth circuit view does not seem compatible with the "uniformity" of coverage Congress was seeking. The evil of the old Act was that it bifurcated coverage for essentially the same employment. The point of rest approach would seem to result in the same sort of bifurcation, since the same employee engaged in an activity beyond the point of rest would cease to be covered. This is not to say that Congress might not have focused the generous benefits of the Act on direct loading and unloading activities to the exclusion of others. These are at the heart of the longshoreman's traditional work and may be more dangerous.[9] But Congress expressly included "terminal" in

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[9] There is no distinction made in the committee reports based on the dangerousness of the work performed. The reports do reflect a belief that state workmen's compensation payments are typically inadequate—not just, it seems, for longshoremen but for workers generally. In the sense that the 1972 Amendments are intended to provide a more adequate level of coverage, they are "remedial" and entitled, like the Act orginally, to be "liberally construed in conformance with its purpose . . . ." *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

the situs provisions of the Act, and we think that if a bifurcation of this sort were intended, the Act, or at least the legislative history, would have pointed to it explicitly. We therefore reject the fourth circuit's point of rest analysis.

We are more persuaded by the reasoning of the second circuit in *Pittston*, which held as follows:

> "We therefore hold that the [1972] Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee had actually begun its movement from the pier (or in the case of loading, from the time when the consignee had stopped his vehicle at the pier), provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel."

Slip op. at 4719. In order to arrive at (1), the *Pittston* court laid heavy stress on the specific mention in the committee reports of "the advent of modern cargo-handling techniques, such as containerization" and on the committees' recognition that this caused more of the longshoreman's work to be performed on land. It also noted the committees' sanction for coverage of "checkers" (who check the contents of containers against bills of lading) without limitation as to where the checking would be done. The court said,

> "Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship . . . . Congress intended to cover men engaged in these activities if they met the situs test contained in the Act—irrespective of the employee's position vis-a-vis a 'point of rest.' . . . One answer to petitioners' argument

> that stuffing or stripping a container on a pier is no different from doing the same job a mile away is that Congress may have doubted its power, under the admiralty clause of Article III, to go further than it did. . . . We fail to perceive any significant difference because, for the convenience of someone, it [the container] had been moved to another pier. The cargo had not yet been delivered to the consignee; the unloading process still had not been completed." [Footnote deleted.]

Slip op. at 4714.

Except in one respect, discussed later, we find Judge Friendly's analysis with respect to handling the contents of containers not only persuasive but compelling. The historical work of longshoremen was said to be, "in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers." *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884, 886 (2d Cir. 1970). This conforms to the usual obligation of the ship "[t]o unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it." *American Presidential Lines, Ltd.* v. *Federal Maritime Board*, 317 F.2d 887, 888 (D.C. Cir. 1962).

If a container is discharged from a vessel containing goods for a number of consignees neither the shipowner nor the longshoremen will have completed their work until the container is stripped and the cargo sorted so as to be accessible to the consignees. We agree with Judge Friendly that it can make little difference with respect to the longshoreman's activity whether the stripping and sorting is done where the container first comes to rest on the pier or shoreward of that point. If there

is a relevant difference, Congress has not mentioned it. The committees do emphasize that coverage is not intended for employees "who are not engaged in loading [or] unloading . . . a vessel"; but it seems both reasonable and consistent with existing practice, to view the unloading process as not yet complete so long as unsorted goods destined for various consignees remain inside the original container within which they were shipped, even though the containers have already been removed from the hold of the vessel. On this premise, one stripping a container retains the status of a "longshoreman" and is "engaged in longshoring operations".

The most troublesome question, as we see it, is reconciling this view with the statement in the committee reports that the compensation system of the Act is to apply to employees who would otherwise be covered for part of their activity. That statement, as well as other parts of the committee reports, indicates that Congress, in moving shoreward, did not see itself as including under the Act whole new groups and classes of employees. Coverage was still to be geared only to persons who loaded and unloaded vessels (or else repaired or built them) and who fit such traditional maritime designations as longshoreman, harborworker, and the like. Thus, as indicated previously, we quite agree with the second circuit that clerks and other like terminal workers are excluded.

The problem is whether those performing longshoring operations, like Stockman, are also to be excluded unless they can demonstrate that part of their normal duties requires them to go aboard a ship—or, as Judge Friendly said (with respect to "cargo handlers", but not strippers or stuffers), unless "the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel". *Pittston*, *supra*, at 4719.

We conclude, however, in accord with the second circuit, that there is no need for such a showing in the

case of persons employed, like Stockman, in the stripping of containers containing unsorted cargo, destined for several consignees, at a location within the situs requirement. Such an individual, like a longshoreman working on the pier alongside a ship during unloading operations, is a longshoreman within § 902(3). Whatever the language of the committee reports, the statute itself calls for no additional showing once that status has been firmly established. It is clear, as indeed Judge Winter recognizes, *I.T.O. supra*, at 1088, that even longshoring work in its traditional form is at times organized so that some workers remain at all times on the pier as part of a continuous loading or unloading process. *See Garrett* v. *Gutzeit O/Y*, 491 F.2d 228 (4th Cir. 1974). Plainly such men are no less longshoremen than their brethren on the vessel. While Congress did not mean in the 1972 amendments to cover new classes of employees not heretofore covered in part, we do not believe it meant to exclude from coverage those particular members of a covered group, e.g. longshoremen, whose individual duties do not happen to take them on shipboard. We read the language of the committee reports as requiring bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act—not necessarily a demonstration by each claimant that he individually would have been covered.

This is not to say that workers who are not plainly longshoremen, or otherwise plainly included in some recognized category of maritime employment, may not have to demonstrate their entitlement to coverage by showing that their duties encompass shipboard activity. Something like this thinking doubtless accounts for clause (2) of the second circuit's formulation, relating to "cargo handlers" as distinct from those stuffing or stripping containers. We expressly do not decide this matter now.

since it is not before us. We hold only that an employee like Stockman, being a longshoreman and engaging in longshoring operations, comes within the status requirement of the Act.

Affirmed. Costs for appellees.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2039

SEA-LAND SERVICE, INC., AND
THE TRAVELERS INSURANCE COMPANY,
Petitioners,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR, AND
WALLACE C. JOHNS,
Respondents.

(Benefits Review Board Nos. 75-124 & 75-124A)

ON PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS
REVIEW BOARD UNITED STATES DEPARTMENT OF LABOR

Argued June 8, 1976
Before ALDISERT, GIBBONS and GARTH,
Circuit Judges

OPINION OF THE COURT
(Filed Aug. 5, 1976)

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GIBBONS, Circuit Judge

This is a petition by an employer to review an order of the Benefits Review Board reversing an order of the administrative law judge which denied benefits to an employee, Wallace Johns, under the Longshoremen's and

Harbor Workers' Compensation Act (LHWCA).[1] The administrative law judge had held that although Johns was engaged in maritime employment at the time of the accident, he was not injured at a situs within the coverage of the Act. The Board concluded that Johns was engaged in maritime employment and was injured at a covered situs. The problem arises out of the 1972 amendments to the LHWCA,[2] and is of first impression in this court.

Johns was employed at the time of the accident by Sea-Land Service, Inc., an intermodal freight carrier that engages in shipping, stevedoring, warehousing, freight consolidation and motor freight operations. Johns' injury occurred when the flatbed truck he was driving, laden with a large crate, overturned on a public street in Port Elizabeth, New Jersey. Port Elizabeth is a part of the sprawling marine terminal area in Newark and Elizabeth, New Jersey that is operated by the Port of New York and New Jersey Authority. Many longshoremen who are covered by the LHWCA are employed at various locations in the marine terminal area. Many other workers in the terminal area are employed by railroads, and are covered by the Federal Employers' Liability Act.[3] Still others, including teamsters, warehousemen, clerks, secretaries and even bank tellers, who work in the marine terminal area are covered by the New

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[1] 33 U.S.C. §§ 901-50. We have jurisdiction under 33 U.S.C. § 921(c) for although the Benefits Review Board ordered a remand to the administrative law judge for the calculation of the exact amount of benefits, that calculation was made and the order was for all purposes final by the time this court was called upon to consider the petition. *Compare* Sun Shipbuilding & Dry Dock Co. v. Benefits Review Board, No. 75-1715 (3d Cir. 1976).

[2] Pub. L. No. 92-576, 86 Stat. 1251.

[3] 45 U.S.C. §§ 51-60.

Jersey Workmen's Compensation Act.[4] All, or at least most, of these employees, are engaged in facilitating the transfer of cargo at the interface between waterborne modes of transportation and land or airborne modes of transportation. Our problem in this case is to determine on which side of the interface Johns was employed when he was injured. That his employer is an intermodal carrier complicates the problem somewhat, although analytically the fact that a single corporate employer operates several modes of transportation should not influence our judgment respecting the statutory reach of the federal and state workmen's compensation laws.

I

Johns was a member of the International Longshoremen's Association, but he was not regularly employed by Sea-Land. On the date of the accident Johns had been hired by Sea-Land for the day (a "shape-up" employee) through the Bi-State Waterfront Commission, which operates a longshoring hiring hall. After appearing for work, Johns agreed to work as a shuttle driver, moving with a tractor rig trailers between Sea-Land's old terminal facility at Berth 52, and its new terminal at Berth 90. Both terminal facilities were enclosed by a fence and were under the control of the employer. The shuttle-run between the two terminals followed public streets for a distance greater than a mile and a half. Johns began his day by hitching a trailer to his tractor at Berth 52 and moving it to Berth 90. While he was making a turn from Rangoon Street onto Bombay Street, an intersection in the public area of the marine terminal, situated one-half mile from the nearest water and one-third mile from Sea-Land's property, the rig overturned and caused Johns' injury. On the day of the accident

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[4] N.J. Stat. Ann. § 34:15.

Sea-Land was in the process of moving its operations from Berth 52 to a larger facility at Berth 90.

Johns originally filed a claim against Sea-Land with the New Jersey Department of Labor and Industry. Payments were made under the New Jersey schedule from January 31, 1973 until March 16, 1973. On July 5, 1973 Johns filed a new claim under the federal statute, which provides for higher benefits. Sea-Land resisted that claim, contending that at the time of the injury the claimant was covered by the New Jersey and not the federal statute. The formal proceedings before the administrative law judge and the Benefits Review Board produced the results described above. Neither the administrative law judge nor the Board made any findings with respect to the contents of the crate that Johns was hauling at the time of the accident, its origin, or its destination. Nor did either make any finding as to whether a vessel was berthed at or expected at Berth 52. Under our interpretation of the 1972 amendments these facts may be of critical importance.

II

Prior to 1972 the term "employee" was defined in § 2(3) of the LHWCA, 33 U.S.C. § 902(3) only negatively:

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

The scope of the Act's affirmative coverage was derived from the definition of "employer" in § 2(4), and the "coverage" provision in § 3(a). An "employer" was described as an employer of persons "employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. § 902(4). Compensation was payable under

§ 3(a) "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death-through workmen's compensation proceedings may not validly be provided by State law." 33 U.S.C. § 903(a) The pre-1972 definitions had originated in the 1927 statute, which was tailored by Congress to fill a void created by the Supreme Court's holding in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), that state workmen's compensation laws were inoperative in the navigable waters of the United States. *See* G. Gilmore & C. Black, The Law of Admiralty § 6-45 (2d ed. 1975). The *Jensen* decision left longshoremen injured on the landward side of a pier with a possible remedy under state workmen's compensation laws, but in the absence of federal legislation not covered when they stepped from the pier onto the gangplank. *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922). The 1927 statute, instead of adopting federal coverage for the entire longshoring operation, merely provided a remedy which filled in the gap created by the *Jensen* holding. *See* Gilmore & Black, *supra*, § 6-48, at 417. In *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969), the Court held that the Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C. § 740, did not change the basic approach of the 1927 statute, and that pierside injuries were still covered by state workmen's compensation laws. The *Nacirema* court made it clear, however, that there was no constitutional barrier to congressional action preempting the entire longshoremen's compensation field to the exclusion of state law.[5] It merely held that the 1927 statute

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[5] The Court said:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain

could not be so construed. That holding pointed up the continuing anomaly that the schedule of benefits to be applied in any case depended on whether the injury occurred on the land or water side of the gangplank.

In 1972 Congress addressed this anomaly in a complex statute reflecting a number of compromises among conflicting interests.[6] Of concern for purposes of this case are the revised definitions of "employer," § 2(3), and "employee," § 2(4), and the revised "coverage" provision of § 3(a). In place of the merely negative definition of "employee" given by the 1927 Act (which excluded crew members), Congress substituted the following language:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of

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outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U.S. at 223-24.

[6] We have considered other aspects of the 1972 amendments in Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs, No. 75-1810 (3d Cir. June 23, 1976) and Nacirema Operating Co. v. Benefits Review Bd., No. 75-1984 (3d Cir. July 2, 1976). *See also* Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 38-41 (3d Cir. 1975), *cert. denied*, 96 S.Ct. 785 (1976).

> any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

33 U.S.C. § 902(3).

Thus the exclusion of crew members[7] was retained, but an affirmative listing of occupations functionally related to the maritime transportation industry was added. For this case the key words are "longshoreman or other person engaged in longshoring operations."

The 1972 amendments also changed the "employer" definition by omitting the limitation "upon the navigable waters of the United States" and substituting

> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

33 U.S.C. § 902(4).

The new definition quite clearly was intended to afford coverage in places which under the 1927 statute had been left to the state workmen's compensation acts. That this was intended is confirmed by the "coverage" provision. The 1972 amendment to § 3(a) omitted the qualification "and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State Law," and thus abandoned the 1927 approach of providing a mere interstitial remedy which deferred to state law to the maximum extent permissible under the *Jensen* holding. As amended, § 3(a) provides:

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[7] Crewmen may, of course, recover for injury under the Jones Act, 46 U.S.C. § 688.

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . ."

33 U.S.C. § 903(a).

Thus the "coverage" provision and the "employer" definition manifest an unmistakable congressional intention to afford federal coverage for injuries occurring in areas inland of the navigable waters of the United States where prior to 1972 Congress had deferred to state law. *See generally* Gilmore & Black, *supra*, § 6-50.

III

In considering the merits of Johns' claim for compensation under the LHWCA as amended, both the administrative law judge and the Benefits Review Board construed the Act to posit twin requirements for coverage. In the definition of "employee" they perceived a "status" test, i.e., whether Johns was "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . ." The Board and the administrative law judge understood § 2(4), the employer definition section, to impose an additional requirement for coverage; namely, that an accident occur upon the navigable waters of the United States (including enumerated adjoining facilities). The Board and the administrative law judge agreed that Johns satisfied the status test. The administrative law judge concluded, however, that the accident took place at a situs that the 1972 amendments did not reach. It was this latter conclusion

with which the Benefits Review Board disagreed.[8] Because of the inadequacy of the record compiled in the administrative proceedings, we are not in position to either approve or disapprove the Board's decision and must remand for additional fact-finding. Nor are we certain that the Board has properly interpreted the scope of the 1972 amendments, a task of no little difficulty as several diverging opinions demonstrate. *See, e.g., Pittston Stevedoring Corp.* v. *Dellaventura*, No. 76-4042 (2d Cir. July 1, 1976); *I.T.O. Corp.* v. *Benefits Review Board*, 529 F.2d 1080 (4th Cir. 1975), *rehearing en banc granted*, (March 12, 1976); *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3645 (U.S. May 6, 1976) (No. 75-1620), and one to which we now turn.

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[8] The Board's entire discussion of this point of disagreement was set out in two paragraphs:

> The administrative law judge relied essentially on *Perdue* v. *Jacksonville Shipyards, Inc.*, 74-LHCA-58 (Sept. 19, 1974), in determining that the accident did not occur upon "navigable waters". The Board has since reversed that decision, and no purpose would be served by restating our reasoning here. *See Perdue* v. *Jacksonville Shipyards, Inc.*, 1 BRBS 297, BRG No. 74-200 (Jan. 31, 1975).
>
> The Act does not require that the injury occur on property owned by the employer. It is enough if the accident takes place in an ". . . adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. § 903(a). The situs of claimant's injury qualifies as such an area since it is directly related to, and an essential part of, the employer's longshoring operations. To hold otherwise would contravene the legislative intent of the 1972 amendments to the Act, which were enacted, in part, to eliminate the circumstance of having persons engaged in maritime employment walk into and out of the Act's coverage during the workday. *See Herron, Jr.* v. *Brady Hamilton Stevedore Co.*, 1 BRBS 273, BRB No. 74-171 (Jan. 23, 1975); *O'Leary* v. *Southeast Stevedore Co.*, 1 BRBS 498, BRB No. 74-228 (May 30, 1975).

IV

As has been noted, *see Southern Pacific Co.* v. *Jensen*, *supra*, the Constitution forbids state compensation laws to intrude on the navigable waters of the United States. On those waters the federal law-making power is exclusive, but the scope of congressional power to enact federal compensation legislation pursuant to its admiralty jurisdiction is, of course, defined by the test of navigability. *State Industrial Commission* v. *Nordenholt Corp.*, *supra*; *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 210 (1971). Doubtless Congress could, in lawful exercise of its commerce power, have supplanted state workmen's compensation remedies throughout the entire range of interstate and foreign commerce. But if a suit for workmen's compensation is an action at law for purposes of the seventh amendment, then any federal compensation law whose coverage extended beyond the limits of admiralty jurisdiction could not be administered under the existing scheme, without provision for jury trial. *See Frank Irey, Jr., Inc.* v. *OSHRC*, 519 F.2d 1200, 1207 (3d Cir. 1974), *on rehearing in banc*, 519 F.2d 1215, 1219 (3d Cir. 1975) (Gibbons, J., dissenting), *cert. granted*, 44 U.S.L.W. 3531 (U.S. Mar. 22, 1976) (No. 75-748); *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 609-10 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). To the extent that compensation claims concern subject matter within Congress' legislative jurisdiction in admiralty, however, it is well-settled that no right to jury trial exists. *Crowell* v. *Benson*, 285 U.S. 22, 45 (1932); *Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. [12 How.] 443, 452-53, 459-60 (1851); *Waring* v. *Clarke*, 46 U.S. [5 How.] 441, 459-60 (1847). Because we assume Congress was aware of the administrative difficulties that would attend upon a commerce-based federal compensation law, we do not believe that in enacting the 1972 amendments to the LHWCA, Congress intended to

exercise any legislative power other than its admiralty jurisdiction.[9] *See Pittston Stevedoring Corp.* v. *Dellaventura, supra*, No. 76-4042 at 4720-22; Gilmore & Black, *supra*, § 6-48 at 417-18. Our problem then, is to decide the extent to which Congress has exercised the power vested in it by Article III, Section 2 of the Constitution. *Panama R.R.* v. *Johnson*, 264 U.S. 375, 386 (1924).

It seems likely, although by no means certain, that Congress could, pursuant to its admiralty jurisdiction, enact a comprehensive workmen's compensation law for maritime employees that provided coverage for injuries sustained in such employment, no matter where they may occur. Justice Story described the admiralty jurisdiction in tort as limited to events actually taking place on the waters, *see DeLovio* v. *Boit*, 7 Fed. Cas. 418, 444 (No. 3,776) (C.C.D. Mass. 1815), while at the same time describing admiralty jurisdiction in contract as comprehending

> "all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea."

Id. See also Insurance Co. v. *Dunham*, 78 U.S. [11 Wall.] 1, 35 (1870). A claim for compensation for personal in-

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[9] The problem of tracing congressional legislation to its intended constitutional source is often perplexing in the maritime context because admiralty jurisdiction closely interfaces with commerce jurisdiction. When Congress in 1845 extended admiralty jurisdiction to the Great Lakes and navigable waters connecting same, Act of Feb. 26, 1845, 5 Stat. 726, it was much mooted whether the Act was a regulation of commerce or of admiralty. There is some evidence that Justice Story, the draftsman of the legislation, regarded the Act as an exercise of commerce power, although the Supreme Court sustained the Act on the latter ground, expressly disavowing the commerce clause basis. *See Propeller Genesee Chief* v. *Fitzhugh, supra*. For an absorbing discussion of the problem see C. Swisher, History of the Supreme Court of the United States, Vol. 5: The Taney Period, 1836-64 at 423-66 (1974).

jury on a theory of strict liability does not fit perfectly into the mold of either admiralty tort or admiralty contract law. We find guidance in determining the limits of congressional law-making authority respecting such subject matter in contract and other cases where the jurisdictional limits are not spatially defined, but depend on the presence of a nexus between the employer-employee relationship and maritime commerce. The maintenance and cure cases are particularly good analogies, because the seaman's right to maintenance and cure is closely related to the workman's right to compensation without fault for injury or death. *See* Gilmore & Black, *supra*, § 6-6, at 281-82. The right to maintenance and cure arises from the fact of the employment relationship (in the service of the ship) and amounts virtually to strict liability. It is now clearly established that a seaman who is stricken with illness or injury is entitled to maintenance and cure even though the accident or illness occurs during shore leave not directly connected with the ship's business. *See Warren* v. *United States*, 340 U.S. 523 (1951); *Farrell* v. *United States*, 336 U.S. 511 (1949); *Aquilar* v. *Standard Oil Co.*, 318 U.S. 724 (1943). By the same token, it should be within Congress' legislative jurisdiction under Article III, Section 2 to provide a remedy for persons injured in the course of maritime employment, irrespective of the place of injury. It is the existence of the special employer-employee relationship, and not the situs of that relationship, that is significant for purposes of admiralty jurisdiction. We find support for this thesis in *Victory Carriers, Inc.* v. *Law*, *supra*, where the Supreme Court indicated that only congressional inaction stood between the Court's acquiesence in the extension of admiralty tort jurisdiction shoreward from its historical outpost on the edge of the navigable waterways. *See* 404 U.S. at 204, 214. *See also Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206 (1962).

Having fixed the limits of congressional law-making authority in admiralty, it remains to be considered the extent to which Congress in the 1972 amendments to the LHWCA invoked that power. We are met at the outset with a conflict of authority. Both the administrative law judge and the Benefits Review Board employed concurrent tests of "status" and "situs" to define the Act's coverage. *Accord, I.T.O. Corp.* v. *Benefits Review Board, supra.* Gilmore and Black acknowledge that there is evidence in the legislative history suggesting that Congress intended to structure the Act's coverage in such a fashion, but urge for policy reasons that the status test be discarded and the situs test be made determinative. *See* Gilmore & Black, *supra,* § 6-51. Judge Friendly rejects this latter position, but concededly adopts an approach that "goes some way" toward "read[ing] the status requirement out of the Act." *Pittston Stevedoring Corp.* v. *Dellaventura, supra,* No. 76-4042 at 4719. Although we find merit in these positions, we prefer to view the problem from a fresh perspective.

Prior to the 1972 amendments to the LHWCA, coverage analysis of necessity involved application of the bifurcated status-situs test. The *Jensen* case fixed the constitutional limit of the state law-making authority to which Congress deferred at the boundary of congressional legislative jurisdiction in admiralty, i.e., at the edge of the navigable waterways. The 1927 Act established a federal compensation remedy for maritime employees, but only to the extent necessary to fill *Jensen's* preemptive void. There was a perfect interface, without overlap, between federal and state law, *see Nacirema Operating Co.* v. *Johnson, supra,* and courts were forced to consider in each case, from the location of the accident, whether state or federal remedies were to be provided.

In the 1972 amendments, however, Congress abandoned the policy of deference to state law-making power.

It invaded what had theretofore been the sole preserve of the states by extending the LHWCA's coverage to some part of the domain in which the states could legislate. The line delimiting the outer reaches of the Act's extended coverage is, we think, functional and not spatial.

Apart from increasing the maximum allowable benefits in exchange for the elimination of the *Sieracki-Ryan*[10] circle of liability, the dominant purpose of the 1972 amendments in extending the Act's coverage to areas previously left to the states was to make more uniform the death and disability compensation system for maritime employees so that maritime workers would no longer walk into federal coverage and out of state coverage, and vice versa, in the course of a day's work. This sentiment is clearly expressed in identical language in both the House and Senate reports accompanying the legislation:

> EXTENSION OF COVERAGE TO SHORESIDE AREAS
>
> The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.
>
> To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come

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[10] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). *See* Griffith v. Wheeling Pittsburgh Steel Corp., *supra*, 521 F.2d at 38-40.

nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. . . .

. . . .

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of a crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately trans-

> ported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News 4707-08. The reference in §§ 902(4) and 903(a) to the navigable waters of the United States should be regarded no more than a shorthand way of relating the function being performed by the injured employee to waterborne transportation, the jurisdictional nexus. We recognize that both of these statutory provisions, as amended in 1972, further state that the "navigable waters" shall include "any adjoining pier, wharf, dry dock, terminals, building van, marine railway, or other adjoining area customarily used by an em-

ployer in loading, unloading, repairing, or building a vessel." But we do not construe this enumeration of covered areas to be an exclusive enumeration. Congress was cautious in its language, but the fact remains that it intended to expand the scope of the LHWCA to provide a federal workmen's compensation remedy for all maritime employees. We believe that Congress has exercised in full its legislative jurisdiction in admiralty. As long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available. Resuscitating the situs requirement in cases satisfying the status test will interfere with Congress' intention to eliminate the phenomenon of shifting coverage. It is the situs of the vessels in maritime commerce, not the situs of their maritime employees at the time of the injury, that in our view Congress referred to by its reference to navigable waters.

We concede, as we must, that the draftsmanship of the 1972 amendments leaves something to be desired and, to a certain extent, obscures this purpose from view. But the overall intention appears to be to afford federal coverage to all those employees engaged in handling cargo after it has been delivered from another mode of transportation for the purpose of loading it aboard a vessel, and to all those employees engaged in discharging cargo from a vessel up to the time it has been delivered to a place where the next mode of transportation will pick it up. A stevedore may receive cargo at one situs and move it over public streets to another situs for loading on a vessel, or may discharge cargo and transport it to a situs not immediately adjacent to a pier for delivery to a truck or rail carrier. The limits of federal coverage is defined not by reference to a geographic relationship with the navigable waters of the United States, but by the location of the interface between the air[,] land and the water modes of transportation. If that interface is customarily

located at some point remote from the pier, the fact that the stevedore uses public streets to move the cargo to or from a "terminal", a "building" or "other adjoining area" does not affect coverage. The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing.

We believe that our view of the 1972 amendments is in substantial conformity with that of Judge Craven, dissenting from the panel opinion in *I.T.O. Corp.* v. *Benefits Review Board, supra.* In that case a divided court held that the 1972 amendments preserved the dual status-situs test for coverage, and that federal coverage began at the "*first* storage or holding area on the pier, wharf, or terminal adjoining navigable waters", and ended at the "*last* storage or holding area on the pier, etc., to the ship," which it called the "point of rest." 529 F.2d at 1087 (emphasis in original). Judge Craven in dissent rejected the "point of rest" analysis as inconsistent with the plain language of the Act, *accord, Pittston Stevedoring Corp.* v. *Dellaventura, supra,* No. 76-4042 at 4712, and urged that longshoring under the statute was a continuous process involving different employees, which continued at all times while the cargo was in maritime commerce as distinguished from land commerce. Although Judge Craven's terminology and ours are somewhat different, we think that our perceptions of the congressional intention are essentially the same. The line which Congress intended to draw was between the maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter. That the one employer may be engaged in both types of commerce is irrelevant. The line should still be drawn where cargo is delivered to a segregated place for delivery to the next mode of transportation.

We note that defining the scope of federal workmen's compensation coverage in this manner is consistent with the provisions of the Harter Act, 46 U.S.C. § 193, and the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(3), defining the point at which the responsibility of the maritime carrier begins. While these statutes do not tell us what the Ninety-Second Congress had in mind when it passed the LHWCA amendments, there is some virtue in a construction of the latter statute that produces consistency with other enactments relating to maritime commerce.

V

We are thus in agreement with the Benefits Review Board that coverage under the Act is not foreclosed by the fact that the accident occurred on a public street in the marine terminal not under the employer's control. But that conclusion only begins the appropriate inquiry. On the day of the accident, according to the evidence, Johns, at Berth 52, hitched a Sea-Land tractor to a container which had just come off a ship at that berth, and took the container to Berth 90, where Sea-Land stored containers. If Johns were an over-the-road driver who picked up the trailer on the pier for delivery to a consignee elsewhere, we would have no difficulty in holding that the interface between water and land transportation took place at Berth 52 and that New Jersey law covered any subsequent injury to the driver. On the other hand, transporting a discharged container to a temporary storage area at Berth 90 appears equally clearly to be related to the stevedoring function rather than to the land transportation function. Likewise, if the crate which Johns was moving at the time of the accident had been received at Berth 90 from a land mode of transportation, or even another water carrier, for temporary storage until it could be loaded on a vessel, and Johns was moving it to Berth 52 to be so loaded,

we would hold that there was federal coverage at the time of the accident.

Our difficulty is that while the evidence respecting Johns' initial trip between Berth 52 and Berth 90 is clear enough, the record is decidedly equivocal about the return trip, during which the accident occurred. Johns testified that he thought the crate was full and was going to a ship, but he gave no information about its source and no other information about its destination. The testimony of William Warnock, the employer's claims adjuster, suggested that Johns may have been mistaken, and may actually have been shuttling equipment between the two terminals, where warehousing and the storage of trailers also takes place. Neither the administrative judge nor the Board made specific findings on this crucial issue. What is clear is that shape-up laborers, hired by the day, are sometimes used to perform what are clearly tasks in maritime employment and are sometimes used in Sea-Land's trucking and warehousing operations. All are members of the longshoremen's union, but obviously that fact is not dispositive of the reach of the federal statute. A great deal of the evidence and argument in the agency proceedings was devoted to the situs of the accident and to control over that situs. Evidence bearing upon the specific function of Johns at the time of injury was inadequately developed. Because the inquiry in the proceedings below was misdirected, a remand is necessary.

VI

The Director, Office of Workers' Compensation Programs, contends that Sea-Land's petition for review should be dismised because the employer did not cross-appeal to the Benefits Review Board from the favorable decision of the administrative law judge. The simple answer is, as we pointed out in *Atlantic & Gulf Stevedores, Inc.* v. *Director, Office of Workers' Compensation Programs*,

No. 75-1810 (3d Cir. June 23, 1976), that the employer was not aggrieved by that order and could not take an appeal therefrom to the Benefits Review Board. 33 U.S.C. § 921(b)(3); 20 C.F.R. § 802.201(a) (1974). Sea-Land was aggrieved by the Board's action, however, and properly seeks judicial review.

Conclusion

The order of the Benefits Review Board will be set aside and the case will be remanded for a determination, consistent with this opinion, as to whether at the time of the injury Johns was engaged in maritime or non-maritime employment. On remand the trier of fact [11] may take additional testimony on that issue if in its view the present record does not contain sufficient evidence for that purpose.

TO THE CLERK OF THE COURT

Please file the foregoing opinion.

Circuit Judge

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[11] Under the statute the administrative law judge and not the Benefits Review Board is the trier of fact. *See* 33 U.S.C. § 921(b)(3).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2039

SEA-LAND SERVICE, INC., AND
THE TRAVELERS INSURANCE COMPANY,
Petitioners

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND WALLACE C. JOHNS,
Respondents

ON PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD UNITED STATES DEPARTMENT OF LABOR

Present: ALDISERT, GIBBONS and GARTH, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the Benefits Review Board, United States Department of Labor and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said Benefits Review Board dated July 11, 1975, be, and the same is hereby set aside and the cause is remanded for a determination, consistent with the opinion of this Court, as to whether at the time of the injury Johns was engaged in maritime or non-maritime employment.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

August 5, 1976

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1051

I.T.O. CORPORATION OF BALTIMORE, EMPLOYER,

and

LIBERTY MUTUAL INSURANCE COMPANY, CARRIER,
Petitioners,

v.

BENEFITS REVIEW BOARD, U.S. DEPARTMENT OF LABOR,
Respondent,

WILLIAM T. ADKINS,
Respondent,

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION,
Amicus Curiae.

No. 75-1075

MARITIME TERMINALS, INC., AND
AETNA CASUALTY AND SURETY CO.,
Petitioners,

v.

SECRETARY OF LABOR, AND DONALD D. BROWN,
Respondents.

No. 75-1196

MARITIME TERMINALS, INC., AND
AETNA CASUALTY AND SURETY CO.,
Petitioners,

v.

VERNIE LEE HARRIS, AND
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

No. 75-1088

NATIONAL ASSOCIATION OF STEVEDORES

AND

CALIFORNIA STEVEDORE & BALLAST CO., CAROLINA SHIP PING COMPANY, THE CHESAPEAKE OPERATING COMPANY, CILCO TERMINAL CO., INC., JOHN T. CLARK & SON OF BOSTON, BERNARD S. COSTELLO, INC., DIXIE STEVEDORES, INC., ELLER & COMPANY, INC., GLOBAL TERMINAL & CONTAINER SERVICES, INC., FEDERAL MARINE TERMINALS, INC., GULF STEVEDORE CORP., HARRINGTON & COMPANY, INC., HOWLAND HOOK MARINE TERMINAL CORP., INDEPENDENT PIER CO., INTERNATIONAL GREAT LAKES SHIPPING CO., INTERNATIONAL TERMINAL OPERATING CO., INC., LAKE CHARLES STEVEDORES, INC., LAVINO SHIPPING CO., LUCKENBACH STEAMSHIP CO., INC., MCCABE, HAMILTON & RENNY CO., LTD., JOHN W. MCGRATH CORP., MAHER TERMINALS, INC.,

MATSON TERMINALS, INC., METROPOLITAN STEVEDORE CO., NACIREMA OPERATING CO., INC., NEW BEDFORD STEVEDORING CORP., NORTHEAST MARINE TERMINAL CO., INC., OLD DOMINION STEVEDORING CORP., JOHN J. ORR & SON, INC., PALMETTO SHIPPING & STEVEDORING CO., INC., PATE STEVEDORING CO., P. C. PFEIFFER CO., INC., PITTSTON STEVEDORING CORP., PORT STEVEDORING COMPANY, INC., RYAN-WALSH STEVEDORING CO., INC., SHIPPERS STEVEDORING CO., T. SMITH & SON, INC., STRACHAN SHIPPING CO., TRANSOCEANIC TERMINAL CORP., UNIVERSAL MARITIME SERVICE CORP., WESTFALL STEVEDORE CO., WILMINGTON SHIPPING CO., YOUNG AND COMPANY OF HOUSTON, ITS MEMBER COMPANIES,
Petitioners,

v.

BENEFITS REVIEW BOARD, U.S. DEPT. OF LABOR,
Respondent,

WILLIAM T. ADKINS,
Respondent.

On Rehearing In Banc.

Argued May 4, 1976 Decided Aug. 26, 1976

Before HAYNSWORTH, Chief Judge, WINTER, CRAVEN, BUTZNER, RUSSELL and WIDENER, in banc.

David R. Owen (Francis J. Gorman, Semmes, Bowen & Semmes on brief) for Petitioners in 75-1051; John B. King, Jr. (Vandeventer, Black, Meredith & Martin on brief) for Petitioners in 75-1075 and 75-1196; Donald A. Krach (William C. Stifler, III, Paul B. Lang, Niles, Barton & Wilmer, Thomas D. Wilcox, on brief) for Peti-

tioners in 75-1088; Linda L. Carroll, Attorney (William J. Kilberg, Solicitor of Labor, Marshall H. Harris, Associate Solicitor, George M. Lilly, Karen L. Gilbert, Attorneys, United States Department of Labor, on brief) for Respondents in 75-1051, 75-1075, 75-1080 and 75-1196; Amos I. Meyers (Terry Paul Meyers on brief) for Respondents in 75-1051 and 75-1088; Charles S. Montagna for Respondents in 75-1075 and 75-1196; Thomas W. Gleason, Jr. (Herzl S. Eisenstadt, Richard H. Kapp on brief) for International Longshoremen's Association, AFL-CIO as Amicus Curiae.

WINTER, Circuit Judge:

These consolidated appeals present two major questions: (1) the extent of coverage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (sometimes "LHWCA"), to persons engaged in the necessary steps in the overall process of loading and unloading a vessel but who, prior to the Amendments, could claim benefits for accidental injury or death, sustained in the process, only under state law; and (2) whether, in a petition for review under 33 U.S.C. § 921(c), the Director, Office of Workers' Compensation Programs, Department of Labor, is a proper respondent. The appeals were first heard and decided by a divided panel of the court. I.T.O. Corp. v. Benefits Review Bd., 529 F.2d 1080 (4 Cir. 1975). Chief Judge Haynsworth and I, comprising the majority, held that during the loading and unloading process the coverage of the Act extended to the first (last) point of rest. As applied to the facts, this holding resulted in the conclusion that none of the three claimants was entitled to benefits. Judge Craven was of a contrary view. He would have held that the three claimants were engaged in mari-

time employment on navigable waters of the United States, as defined in the Act, and hence they should be entitled to benefits under the Act for their accidental injuries. The panel was unanimous in deciding that the Director was not a proper respondent, although it was recognized that, in a proper case, he might be permitted to become an intervenor.

Because of the importance and novelty of the questions decided, the entire court granted cross-petitions for rehearing and reheard the appeals in banc. At the time the appeals were reargued, the in banc court consisted of six judges.

I.

On the issue of the extent of the Act's coverage, Chief Judge Haynsworth, Judge Russell and I subscribe to the views expressed in the majority panel decision. Judge Widener subscribes to the principle expressed in that opinion, although he defines the exact point between coverage and non-coverage somewhat differently.

In his application of the principle, Judge Widener concludes that the claimant Adkins is not covered by the Act, but that claimants Brown and Harris are covered. He reasons that the test of coverage is whether an otherwise eligible employee is injured while engaged in loading or unloading a ship; coverage would not extend to activities for transshipment of goods removed from a ship or goods destined for a ship. In Adkins' case, a container was removed from the ship and stored in the marshaling area. From there the container was moved to a shed where it was stripped and the contents were stored. Adkins was injured when he was moving the contents from the storage area onto a waiting delivery truck. The cargo was no longer being unloaded from the ship but was in the process of being loaded into a delivery truck. Adkins, in Judge Widener's view, was thus not covered

because he was not participating in the unloading process; he was handling the goods for transshipment. Accordingly, Judge Widener concurs in the judgment of Chief Judge Haynsworth, Judge Russell and me to reverse Adkins' award.

In Brown's case, the cargo was brought from somewhere inland and deposited in a warehouse. Brown, operating a forklift, picked up cargo and stuffed it into a container. While stuffing the container, Brown was injured. When the stuffing would have been completed, a hustler would have carried the container to the marshaling area, and from there the container would have been taken to the pier to be loaded on board. Thus, in Judge Widener's view, Brown was engaged in the overall process of loading the ship. The cargo was not merely being moved to storage for convenience or facility; the cargo was in the process of being loaded on board ship, and Brown was engaged in the loading process. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Brown.

Harris was a hustler who was injured while he was taking a container, stuffed with goods which had been stored after inland delivery, from the stuffing area to the marshaling area. From the marshaling area, the container would have been taken to the pier where it would have been loaded on board. The goods were being moved solely for loading purposes, not for mere convenience, and therefore, in Judge Widener's view, Harris, like Brown, was engaged in the overall process of loading the ship. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Harris.

Judge Craven and Judge Butzner subscribe to the views expressed by Judge Craven in his dissenting panel opinion, and for those reasons and the additional reasons

expressed by Judge Butzner in his separate opinion attached hereto, they vote to affirm the awards made to Adkins, Brown and Harris.

By the majority votes of Chief Judge Haynsworth, Judge Russell, Judge Widener and me, the award to Adkins (Nos. 75-1051 and 75-1088) is reversed. By an equally divided court, the awards to Brown and Harris (Nos. 75-1075 and 75-1196) are affirmed.

II.

On the issue of whether the director is a proper respondent, an issue raised only in Nos. 75-1051 and 75-1088, Chief Judge Haynsworth, Judge Russell, Judge Widener and I subscribe to the views expressed in the majority panel decision as hereafter amplified. Judge Craven and Judge Butzner subscribe to the views expressed in Judge Butzner's separate opinion attached hereto.

III.

Chief Judge Haynsworth, Judge Russell, Judge Widener and I amplify our conclusion that the Director is not a proper respondent as follows:

Prior to the 1972 Amendments, the Act provided for judicial review by an injunction suit against the deputy commissioner making a compensation award. The pertinent part of 33 U.S.C. § 921(b) (1970), *as amended*, 33 U.S.C. § 921(c) (1976 Supp.), provided:

> If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in . . . the judicial district in which the injury occurred . . . .

One of the 1972 Amendments revised § 921 so that subsection (c), the counterpart of the previous subsection (b), now provides:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court . . . a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted . . . to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings . . . .

Certainly the deputy director was a party to pre-1972 litigation, but neither he nor his counterparts is expressly designated as a party by the 1972 Amendments. The legislative history is unenlightening as to the reason for this omission. While it is true that old § 921a [1] provided that the United States Attorney would represent the Secretary or the Deputy Commissioner in any court proceedings under old § 921, and that § 921a was continued by the 1972 Amendments although modified to permit the Secretary to appoint his own counsel,[2] the legislative his-

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[1] 33 U.S.C. § 921a, *as amended*, 33 U.S.C. § 921a (1976 Supp.):

> In any court proceedings under section 921 of this title or other provisions of this chapter, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal.

[2] 33 U.S.C. § 921a (1976 Supp.):

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

tory is again unenlightening. To conclude from the mere existence of new § 921a that the Secretary, or his designee, the Director, is automatically a party to a review proceeding is to beg the question. This section's existence can as well mean only that if otherwise made a party, *e.g.*, by intervention in a review proceeding, the Secretary or Director will be represented by attorneys appointed by him.

Indeed, § 939(c)(1), added by the 1972 Amendments, suggests the latter reading. It provides that "[t]he Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim." It would be a redundancy for the Secretary to be authorized to provide legal services to a prevailing claimant if the Secretary himself was intended actively to litigate to sustain an award.[3] Thus, unlike the pre-1972 Act and numerous other laws providing for judicial review or orders of administrative agencies,[4] the LHWCA, as

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[3] We fail to understand how the Director's statutory duty to provide legal assistance to claimants confers upon him a stake in the proceedings independent of that of any claimant, as apparently urged by the dissent. The issue we confront is not whether the Director may appear before us as Adkins' representative, but whether the Director may participate in his own behalf.

We also note that we find nothing in the statute or its legislative history to indicate that the availability of legal assistance to claimants may be made to turn upon whether the Director agrees or disagrees with the decision which a claimant seeks to appeal, as the dissent appears to suggest, *infra*, slip opinion at 20 ("*If he deems the decision erroneous*, his statutory duty to assist the claimant includes seeking review.").

[4] Most other statutes providing for judicial review of agency action are simply not analogous to the LHWCA because under them true adversity exists between the claimant of a *government* benefit and the government agency which seeks to withhold it. Thus, when review of agency action is sought by an unsuccessful applicant for a license before the FCC, *see* 47 U.S.C. § 402, or an unsuccessful applicant for a rate increase before the FPC, *see* 16 U.S.C. § 825*l*(b), or an unsuccessful claimant for Supplemental

amended in 1972, does not on its face make the Director a respondent to a petition to review under § 921(c).

Since the Act is not specific, it follows that, if the Director is to be a party, he must be a "person adversely affected or aggrieved by a final order of the Board" within the meaning of § 921(c). Whether he is or is not is a question closely akin to the issue of whether the "case or controversy" requirement of Article III of the Constitution has been met.

Security Income before the Secretary of H.E.W., *see* 42 U.S.C. §§ 405(b), 1383(c)(3), it is clear that the agency must be named a respondent since *it* is the party against whom relief is sought; the court could not grant an effective remedy without its presence. (Conversely, these agencies would never have reason to seek review of their own decisions.) In LHWCA cases, on the other hand, it is the private employer or insurance carrier which will have to pay any award which may be entered.

The Labor-Management Relations Act is more nearly similar to the LHWCA, since under it, as under the LHWCA, disputes are adjudicated between antagonistic private parties. And the NLRB may be called upon to defend its decisions in court. *See* 29 U.S.C. § 160(f). However, the NLRB's status as a party in the courts of appeals derives from its enforcement powers. *See id.* ("Upon the filing of such petition [for review], the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section [granting the Board power to enforce its decisions in court], and shall have the same jurisdiction . . . to make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board"). Thus, like the FCC, the FPC, the Secretary of H.E.W. and other agencies, the NLRB is an adverse party in court because adjudication is being sought of *its* right to grant relief in behalf of the prevailing party before it. The Director, Office of Workmen's Compensation Programs has no enforcement powers comparable to those of the NLRB.

Moreover, it is not the decision of the *Director* which is called into question by a petition for review under 33 U.S.C. § 921(c), but that of the Benefits Review Board. Thus, the Director does not possess even a concrete interest in defending his *own* decision in court, as does, for example, a district judge against whom a writ of mandamus is sought. As we noted in the majority panel opinion, the Benefits Review Board has specifically asked that it *not* be denominated a party respondent in these proceedings. To that request, we acceded.

Generally, to be adversely affected or aggrieved under the statute or to present a case or controversy under the Constitution, one must have suffered "injury in fact, economic or otherwise." *See* K. Davis, Administrative Law (1970 Supp.) § 22.00-1 at 706; 3 *id.* § 22.02. Therefore, to be a party before this court, the Director must have some concrete stake in the outcome of the case.

The Director asserts he has the requisite stake because

> [h]e is directly affected in his official capacity by the correctness of the Board's decision involving the proper scope of coverage of the Act with whose administration he is charged as the designee of the Secretary of Labor.

The Secretary of Labor's administrative duties, delegated to the Director, *see* 20 C.F.R. § 701.202, are set out in 33 U.S.C. § 939. Subsection (c) (1) is most arguably relevant to the Director's stake in the Board's decisions:

> The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

But we do not think that these duties provide the requisite stake. They do not confer upon the Director any specific interest in the proper administration of the Act.

In United States ex rel. Chapman v. F.P.C., 191 F.2d 796, 799-800 (4 Cir. 1951), *rev'd*, 345 U.S. 153 (1953), we held that the Secretary of the Interior lacked standing to challenge an order granting a license to a private com-

pany to construct a dam. The Secretary claimed to be affected by the order because it was his statutory duty to market surplus electrical power from publicly constructed dams. The Supreme Court reversed without opinion on this point, upholding standing. 345 U.S. at 156. *See* 3 K. Davis, supra, § 22.15 at 280.

The Director asserts that *Chapman* supports his position before us, but we disagree. The Secretary of the Interior in *Chapman did* have some stake in the outcome: it would have been harder for him to market public power if another private dam was built. Alternatively, if the private project was disapproved, it would have been more likely that a public dam would eventually have been built, in which case the Secretary would have had more power to market. Thus, regardless of whether the Secretary was faced with a surplus or a shortage of electrical power to market under his statutory authority, the FPC's decision would directly affect him in the performance of his marketing obligations. The Director in this case has no such specific interest. Therefore, we read *Chapman* to suggest that the Director does not have a stake in the outcome and cannot be a party.

The lack of a stake in the outcome on the part of the Director would appear to end our inquiry. The Director argues, however, that because he is a party to proceedings before the Board, 20 C.F.R. § 801.2(10), it would be anomalous if he were not a party before this court. There are several answers to this argument. First, of course, that the Director is a party to proceedings before the Board does not alter the fact that he has no direct stake in the outcome of the case, is not a person aggrieved by Board action and is thus without a case or controversy to assert. Second, the fact that one is permitted to be a party to administrative proceedings does not require that one be entitled to initiate judicial review

of those proceedings: [5] in the former case, the participant may perform a useful role by calling to the administrative agency's attention considerations it could not on its own initiative, much in the way that an intervenor would in this court; in the latter situation, however, the hopeful party is seeking to initiate a new level of proceedings because of dissatisfaction with the result below. *See* 3 K. Davis, supra, § 22.08 at 242.

Finally, it would appear even from the regulations implementing the Act that the Director is not *automatically* to be a party in this court, even though he is automatically a party before the Board. In 20 C.F.R. § 801.2(10), "party" is defined as follows" "the Secretary or his designee *and* any person or business entity aggrieved or directly affected by the decision or order from which an appeal to the Board is taken." (Emphasis added.) However, 20 C.F.R. § 802.410 provides: "any *party* adversely affected or aggrieved by such decision [of the Board] may take an appeal to the U. S. Court of Appeals . . . ." (Emphasis added.) Thus, the Secretary is a "party" before the Board even if he is not "aggrieved"; but to be entitled to participate in court proceedings, the

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[5] While the Director here seeks to be named a *respondent* to a petition for review, a holding that he is a "person aggrieved" whose presence insures proper adversity would necessarily lead to the conclusion that he is entitled to petition for review of a decision of the Benefits Review Board of which he disapproves: if the Director has an interest in sustaining a Board decision with which he agrees, then he also has an interest in overturning a decision with which he disagrees. He would not readily subject the LHWCA to a construction under which the official charged with administering the Act could invoke the aid of the federal courts to reverse the decision of the board responsible for adjudicating claims under the Act. The unfairness of such a result is manifest if one contemplates the possibility that in some future case the Director, in furtherance of his asserted interest in determining "the proper scope of coverage of the Act," might seek to reverse an award to a claimant on the ground that the Board had been too generous.

Secretary, although a "party" below, must, like any other "party," be adversely affected.

In summary, we stand firm in our conclusion that the Director is not automatically a respondent in a review proceeding under § 921(c).

In our earlier opinion, we added that we did not decide that "a court of appeals may not, in a proper case, permit intervention by others [including the Director] who have an interest at stake . . . ." We elaborate on that comment: The Director unquestionably has a right to seek to intervene under Rule 24(b), Fed. R. Civ. P.,* and an application will ordinarily be granted. See 3B J. Moore, Federal Practice ¶ 24.10[5]; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1912. The Director has not, however, sought intervention in these cases. We assume that he has not done so because he does not wish to render moot his assertion that such a request on his part is unnecessary. Having decided that such a request is necessary, we will still consider such a request on his part should he be advised to make it.

Nos. 75-1051 and 75-1088—REVERSED.

Nos. 75-1075 and 75-1196—AFFIRMED.

Each Party to Pay His Own Costs.

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* The Federal Rules of Civil Procedure principally govern procedure in the United States district courts in suits of a civil nature, Rule 1, but Rule 81(c) makes them applicable also to review proceedings under the Act to the extent that the Act does not prescribe procedure.

BUTZNER, Circuit Judge, dissenting:

I

I believe that the Director, Office of Workmen's Compensation Programs, should be recognized as a party to these proceedings. This issue raises a simple question of statutory construction. In 33 U.S.C. § 939(c), Congress authorized the Secretary of Labor to assist claimants and to provide them legal assistance. This statute must be read along with 33 U.S.C. § 921(a), which provides that attorneys appointed by the Secretary shall represent him before the courts of appeals. The Secretary has properly delegated his responsibilities to the Director.

Regulations under the Act establish the Director as a party before the Benefits Review Board. 20 C.F.R. § 801.3(10). His stake in the proceedings arises out of the duty imposed by 33 U.S.C. § 939(c)(1) to assist claimants. Thus, the Director, like any other party before the Board, is aggrieved within the meaning of 33 U.S.C. § 921(c) by an adverse decision of the Board. If he deems the decision erroneous, his statutory duty to assist the claimant includes seeking review. If the decision favors the claimant, the statute authorizes the Director to support the award on review.

In sum, the Act expressly places on the Secretary or his designee, the Director—not upon the courts of appeals—the responsibility of determining when the Director should participate in the review of the Board's orders. Congress did not condition the Director's appearance in our court on our granting or withholding permission.

The difference between the Director's status as a permissive intervenor and as a party is more than a technical nicety. The majority rule, as I see it, will create road-blocks to filing petitions for review and certiorari,

and it will provoke extended litigation over whether the Director's position in a given case satisfies the requirements of Rule 24(b). Other circuits have wisely recognized the Director's status as a party. *See, e.g.*, Pittston Stevedoring Corp. v. Dellaventura, No. 76-4042 (2d Cir. March 16, 1976); McCord v. Cephas, No. 74-1948 (D.C. Cir. March 25, 1975). I am not persuaded that we should differ from their sound conclusions.

II

I fully agree with Judge Craven that the point of rest theory espoused by the majority of the court is a judicial gloss on the 1972 Amendments of the Longshoremen's and Harbor Workers' Compensation Act, which is warranted by neither the Act nor its legislative history. *See* I.T.O. Corp. v. Benefits Review Board, 529 F.2d 1080, 1089 (4th Cir. 1975) (Craven, J., dissenting). I add only these brief observations. A careful study of the majority opinion filed when this case was heard by a panel, *I.T.O. Corp.*, 529 F.2d at 1081, discloses that the effect of the point of rest theory is to deprive longshoremen of coverage under the Act when they are injured while stuffing or stripping a ship's containers at a marine terminal. The slight modification of the theory in the majority's per curiam opinion alleviates some, but not all, of its harsh results. It does so, however, at the expense of adding the factor of lapse of time to the vague concept of place for determining the point of rest. Rational, uniform application of the court's theory to the myriad circumstances in which injuries occur will be most difficult.

Judge Craven initially voted with the majority to deny the Director standing as a party to these proceedings. On en banc reconsideration, he is now persuaded otherwise, and concurs in Judge Butzner's opinion.

APPENDIX H

Effect of 1972 Amendments on Injuries Reported Under Longshore and Harbor Workers' Compensation Act Comparison of Old and Extended Coverage Fiscal Year 1975

	Injuries Reported							
	Old Coverage [1]		Extended Coverage [2]		Coverage Undetermined [3]		Total [4]	
District Office	Number	Percent of Total	Number	Percent of Total	Number	Percent of Total	Number	Percent
Boston	20,580	47	21,946	51	836	2	43,362	100
New York	6,088	62	3,450	35	261	3	9,799	100
Philadelphia	1,529	27	4,087	72	33	1	5,649	100
Baltimore	2,988	26	8,379	74	21	*	11,388	100
Norfolk	4,147	31	9,042	69	20	*	13,209	100
Jacksonville	5,901	48	6,436	52	48	*	12,385	100
New Orleans	11,324	75	3,601	24	184	1	15,109	100
Houston	4,656	29	11,632	71	–	–	16,288	100
Cleveland	788	57	510	37	83	6	1,381	100
Chicago	817	52	704	46	26	2	1,547	100
San Francisco	8,409	77	2,459	23	36	*	10,904	100
Seattle	4,286	51	4,030	48	137	1	8,453	100
Honolulu	458	72	159	25	20	3	637	100
Total	71,971	48	76,435	51	1,705	1	150,111	100

[1] Coverage in effect before 1972 Amendments—aboard vessel or over water.

[2] Shoreside coverage added by 1972 Amendments.

[3] Type of coverage (Old or Extended) unable to be determined.

[4] Total injuries reported, including fatalities, from item 3 of form LS-3.

* Less than .50 percent.

Prepared by: Branch of Workers' Compensation Statistics—July 22, 1975

Effect of 1972 Amendments on Injuries Reported Under Longshore and Harbor Workers' Compensation Act
Comparison of Old and Extended Coverage
Fiscal Year 1976

Districts	Total [1]	Old Coverage [2]		Extended Coverage [3]		Coverage Undetermined [4]	
	Number	Number	Percent of Total	Number	Percent of Total	Number	Percent of Total
Boston	46,506	19,117	41	26,961	58	428	1
New York	10,775	5,273	49	5,274	49	228	2
Philadelphia	6,650	2,320	35	4,298	65	32	*
Baltimore	12,356	2,557	21	9,799	79	0	–
Norfolk	18,330	4,880	27	13,359	73	91	*
Jacksonville	19,292	6,991	36	12,297	64	4	*
New Orleans	20,092	13,319	66	6,261	31	512	3
Houston	16,691	3,974	24	12,717	76	0	–
Cleveland	1,957	1,043	53	841	43	73	4
Chicago	2,860	1,052	37	1,796	63	12	*
San Francisco	12,017	8,598	71	3,358	28	61	1
Seattle	8,191	4,184	51	3,932	48	75	1
Honolulu	584	411	70	158	27	15	3
Total	176,301	73,719	42	101,051	57	1,531	1

[1] Total injuries reported, including fatalities, from item 3 of form LS-3.

[2] Coverage in effect before 1972 Amendments—aboard vessel or over water.

[3] Shoreside coverage added by 1972 Amendments.

[4] Type of coverage (Old or Extended) unable to be determined.

* Less than .50 percent.

Prepared by: Br. of Workers' Compensation Statistics—August 1976